TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1951

No. 38

DOMINIC PALMER, PETITIONER,

vs.

STANLEY P. ASHE, WARDEN, WESTERN STATE PENITENTIARY, PITTSBURGH, PENNSYLVANIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

PETITION FOR CERTIORARI FILED DECEMBER 8, 1950.

CERTIORARI GRANTED APRIL 30, 1951.

SUPREME COURT OF THE UNITED STATES

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[fols. 1-2]

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,
County of Allegheny, ss:

No. 426 January Term, 1950

COMMONWEALTH OF PENNSYLVANIA ex rel. DOMINIC PALMER

vs.

STANLEY P. ASHE, Warden Western State Penitentiary,
Pittsburgh, Pennsylvania

APPEARANCE DOCKET ENTRY

October 11, 1949, Rule for Writ of Habeas Corpus. Petition and Affidavit filed. October 11, 1949, Petition ordered filed and a Rule granted on Stanley P. Ashe, Warden Western State Penitentiary and the District Attorney of Allegheny County, Pennsylvania, to show cause why a Writ of habeas corpus should not issue, Rule returnable to October 20, 1949. December 8, 1949, Answer of Stanley P. Ashe, Warden, filed. December 8, 1949, Answer of William S. Rahauser. December 8, 1949, After due consideration of the petition and record in this case, the Petition for a Writ of Habeas Corpus is dismissed and the Writ is denied. The Prothonotary us directed to mail a copy of this Opinion and Order of Court to the Petitioner, to Stanley P. Ashe, Warden, and to the District Attorney of Allegheny County. All costs to be paid by the County of Allegheny. Eodie exception noted to petitioner and Bill sealed. Eodie Opinion filed. April 10, 1950, Certiorari in Appeal Exparte Dominic Palmer to Superior Court filed.

[fol. 3] IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

[Title omitted]

ORDER OF COURT—Filed October 11, 1949

October 11th, 1949, the within petition is ordered filed and a rule is hereby granted on Stanley P. Ashe, Warden, Western State Penitentiary, and the District Attorney of Allegheny County, Pennsylvania, to show cause why a writ of habeas corpus should not issue; rule returnable to October 20, 1949.

By the Court, H. R., President Judge.

[fol. 4] IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

No. —, — Term, 1949

COMMONWEALTH OF PENNSYLVANIA EX REL. DOMINIC PALMER

vs.

STANLEY P. ASHE, Warden Western State Penitentiary

PETITION FOR WRIT OF HABEAS CORPUS—Filed October 11, 1949

To the Honorable, the Judges of the said Court:

The Petition of Dominic Palmer respectfully represents:—

First: That under the date of February 18, 1931, he was sentenced to imprisonment of not less than ten (10) years nor more than thirty (30) years in the Western State Penitentiary at No. 23 and 24 January Sessions, 1931, in the Court of Oyer and Terminer of Allegheny County, Pennsylvania; the record of said proceeding, by reference thereto, being made a part hereof.

Second: Your petitioner, a young irresponsible boy, having spent several years in Polk (because he was mentally abnormal), as well as several years in Morganza, and after being taken in custody by the police authorities of the City of Pittsburgh on December 20, 1930, was confined in No. 6 Police Station on Broad Street, Pittsburgh, and on Decem-

ber 21, 1930, he was taken from said Police Station to the Allegheny County Jail.

Third: Your petitioner was then taken from the said County Jail to a courtroom, where the District Attorney informed the Court, that "the defendant wishes to plead [fol. 5] guilty" and in the matter of a minute, more or less, the for-going sentence was entered after he answered "Yes." to the Court's query, "Do you plead guilty to this charge?"

Fourth: Your petitioner was advised by the police authorities, when he was taken in custody, that the charge against him was breaking and entering the Leaders Dry Goods Store on Frankstown Avenue.

Fifth: At no time, either before he answered the court's query, or at the time the aforesaid sentence was entered, was your petitioner aware of the fact that he was being held to a charge of Robbery, and he, in fact, did not know that he was being so held until he was in the Western State Penitentiary being examined by the Psychology Department of this institution.

Sixth: Your petitioner had no reason to suppose that he personally was being held to a charge of Robbery, inasmuch as he was advised at the time of his hearing before Magistrate Papale, that the charge against him was breaking and entering, and at no time thereafter was he advised or apprised of any other charge against him until he was already in the penitentiary as aforesaid.

Seventh: At no time during all the proceedings in this case, either while your petitioner was confined in jail or while he was in Court as aforesaid, was he shown the Bills of Indictment being used in this case or was the said Bills of Indictment read to him.

Eighth: Your petitioner was not represented by counsel, nor offered counsel, or advised of his right to have counsel, [fol. 6] and he expressly claims that the trial Court lacked due process of law under the Fourteenth Amendment to the Constitution of the United States.

Uveges v. Pennsylvania, — U. S. —;
Townsend v. Burke, — U. S. —.

Ninth: Your petitioner was released on parole on September 19, 1947; and on April 1, 1949, he was returned to the penitentiary for no other reason than because he lacked a place of employment.

Tenth: The record of his commitment is illegal for the following reasons:

1. It shows that he pled guilty to an unnamed, unspecified charge . . . all of which is unconstitutional.
2. It shows that his plea to an unspecified charge was illegally appropriated to other indictments which he did not then, and does not now admit.
3. It shows that he was denied his constitutional right, in that he was not permitted to learn "the nature of the accusation against him" either before a Magistrate or in the Courtroom.
4. It shows that he was denied his constitutional right, in that he was neither permitted to "face his accuser" in a Magistrate's Office or in the Courtroom.
5. It does not contain any written authentic plea or any waiver of trial by jury.
6. The Court's sentence is excessive.

Wherefore, your petitioner prays your Honorable Court direct the issuance of a Writ of Habeas Corpus directed to Stanley P. Ashe, Warden of the Western State Penitentiary, or to such person in charge of said institution and in whose custody your petitioner may be found, that cause be shown, if any exist, why he should not be discharged and set free, making said Writ returnable forthwith.

[fols. 7-8]

And he will ever pray, etc.

Dominic Palmer, Petitioner.

Duly sworn to by Dominic Palmer. Jurat omitted in printing.

[fol. 9] IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYIVANIA

[Title omitted]

ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS—Filed December 8, 1949

To the Honorable, the Judges of said Court:

And now comes Stanley P. Ashe, Warden of the Western State Penitentiary, respondent above named, and admits that Dominic Palmer is being confined and restrained of his

liberty in the Western State Penitentiary, but in answer hereto states as follows:

(1) That the said Dominic Palmer was received at the Western State Penitentiary on February 20, 1931, under sentences imposed on February 18, 1931 by Honorable George V. Moore in the Court of Oyer and Terminer of Allegheny County as follows:

(A) No. 24 January term 1931—Attempted robbery—5 to 15 years; sentence to be effective from February 18, 1931.

(B) No. 23 January term 1931—Robbery—5 to 15 years; this sentence to begin and take effect at the expiration of the sentence imposed at No. 24 January term 1931.

(2) That because of his criminal and institutional records and other facts in his case, parole on his first bill of indictment (O&T #24 January term 1931, the minimum of which expired on February 18, 1936) was refused until August 26, 1942 at which time he was granted parole by the Pennsylvania Board of Parole in order to permit him to begin serving the sentence imposed on him at O&T #23 January term 1931.

(3) That the said Dominic Palmer was granted parole by the Pennsylvania Board of Parole on his second and final bill of indictment (O&T #23 January term 1931) on or after August 26, 1947 subject to a parole plan acceptable to the Board; such a plan was approved by the Board of Parole and he was released on parole on September 19, 1947.

[fols. 10-11] (4) On April 1, 1949 the said Dominic Palmer was returned here as a violator of parole rules after he had been declared delinquent by the Board of Parole, he being taken into custody on March 7, 1949. He was not penalized for time spent on parole, being given full credit for that period. His maximum sentence will expire on August 26, 1957.

(5) According to the records compiled by the Identification Department of this institution, the said Dominic Palmer was born on December 18, 1909 and his prior criminal history is as follows:

1916. St. Paul's Orphanage, Pgh. Pa., Taken out by father after 1 year.

8-12-18. Polk St. Sch., Polk, Pa., Imbecile, indeterminate; released 9-10-20.

10-31-21. THS, Warrendale, Pa., Larceny, indeterminate; paroled 4-14-24, ret'd 6-30-24 (delinquent and larceny); discharged 6-1-26.

7-21-27. PTS, Morganza, Pa., Breaking and Entering, indeterminate, served 2½ years, paroled, returned for parole violation 8-4-30; discharged 12-18-30.

So answers:

S. P. Ashe, Warden of the Western State Penitentiary.

[fol. 12] IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

[Title omitted]

ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS—Filed December 8, 1949

And now comes William S. Rahauser, District Attorney of Allegheny County, Pennsylvania, by Leonard H. Levenson, Assistant District Attorney, and answers as follows the rule to show cause issued by the Court in the above captioned matter on October 10, 1949.

First: On the 18th day of February, 1931, in the Court of Oyer and Terminer of Allegheny County, Pennsylvania, the relator was sentenced at No. 24 O & T January Sessions, 1931, on a charge of Attempted Armed Robbery, to a term of imprisonment in the Western State Penitentiary of not less than five years or more than fifteen years.

Second: On the said 18th day of February, 1931, in the Court of Oyer and Terminer of Allegheny County, Pennsylvania, the relator was sentenced at No. 23 O & T January Sessions, 1931, on a charge of Armed Robbery, to a term of imprisonment in the Western State Penitentiary of not less than five years or more than fifteen years, to begin at the expiration of the sentence at No. 24 O & T January Sessions, 1931.

Third: The above sentences were imposed by the Court following the entry of pleas of guilty by the relator in open court to true bills returned by the Grand Jury of Allegheny County at the respective numbers and terms.

Argument

Relator's contentions are summarized in Paragraph Tenth of his petition. These contentions are set forth in [fol. 13] the relator's own language and discussed separately below:

1. Relator's first contention is,

> "It shows that he pled guilty to an unnamed, unspecified charge . . . all of which is unconstitutional."

The records filed in the Office of the Clerk of Courts of Allegheny County, Pennsylvania, at Nos. 23 and 24 O & T January Sessions, 1931, clearly indicate that the relator entered a plea of guilty to specific charges. At No. 23 January Sessions, 1931, the indictment to which the relator pleaded guilty charged him with having committed the offense of armed robbery by having, on December 18, 1930,

> ". . . being then and there armed with offensive weapons, to-wit: revolvers, with force and arms, in and upon one David Brinn feloniously did make an assault, and did then and there feloniously beat, strike and ill use the said David Brinn and do violence to said David Brinn with intent then and there to feloniously rob the said David Brinn of the sum of twenty dollars, lawful money of the Government of the United States of the goods, moneys, chattels and property of the said David Brinn, from the person of the said David Brinn, feloniously did rob, seize, steal, take and carry away, contrary to the form of the Act of General Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania."

At No. 24 O & T January Sessions, 1931, the indictment to which the relator pleaded guilty charged him with the offense of attempted armed robbery, by having, on December 18, 1930,

> ". . . being then and there armed with offensive weapons, to-wit: revolvers, with force and arms, in and upon one Peter Rosella feloniously did make and assault, and did then and there feloniously beat, strike and ill use the said Peter Rosella and do violence to said Peter Rosella with intent then and there to feloni-

ously rob the said Peter Rosella contrary to the form of the Act of General Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania."

Relator's second contention is,

"It shows that his plea to an unspecified charge was illegally appropriated to other indictments which he did not then, and does not now admit."

The Court records clearly show that the relator did not plead guilty to unspecified charges, but pleaded guilty to [fol. 14] the indictments set forth above, and that his plea of guilty to each indictment was duly endorsed on the back of each indictment by the court clerk.

3. Relator's third contention is,

"It shows that he was denied his constitutional right, in that he was not permitted to learn the 'nature of the accusation against him' either before a Magistrate or in the Courtroom."

The records of the Clerk of Courts of Allegheny County, Pennsylvania, filed at Nos. 23 and 24 January Sessions, 1931, show that in Information No. 7436 of 1931, Bernard Kirley, Police Inspector of the City of Pittsburgh, on the 22nd day of December, 1930, appeared before Charles F. Papale, Police Magistrate and, under oath, charged that on the 18th day of December, 1930, the relator and others,

". . . did then and there on the above day and date unlawfully and feloniously assault one David Brinn owner of a grocery store situated at 5701 Hays Street, City of Pittsburgh, County aforesaid, defendants being then and there armed with revolvers, deadly weapons, with the felonious intent in so doing to rob and steal the goods and chattles from his person and said defendant did then and there rob and steal Twenty Dollars ($20.00) from the cash register of the said grocery store of David Brinn, lawful money of the United States, all the property of the said David Brinn."

The Information charged further that,

"December 18, 1930, defendants aforesaid did then and there on the above day and date unlawfully and

feloniously assault on Peter Rosella, owner of a grocery store situated at 6361 Dean Street, City of Pittsburgh, County aforesaid, defendants being then and there armed with revolvers, deadly weapons, with the felonious intent in so doing to rob and steal the goods and chattles from his person."

4. Relator's fourth contention is,

"It shows that he was denied his constitutional right, in that he was neither permitted to 'face his accuser' in a Magistrates Office or in the Courtroom."

The transcript of the Magistrate's docket shows that a [fol. 15] hearing was held before the Magistrate on the 23rd day of December, 1930, at 9:00 A. M. at which the relator appeared, and at which the following witnesses for the Commonwealth were produced, sworn, and examined: David Brinn, Peter Rosella, William Ruppert and John Bradley. The records of the Clerk of Courts of Allegheny County, Pennsylvania, further show that on February 18, 1931 at Nos. 23 and 24 O & T January Sessions, 1931 in the case of Commonwealth v. Dominick Palmer, et al., the following witnesses for the Commonwealth appeared against the relator: W. H. Rose, John Hickey, John Barrett and Edward Kilpatrick.

5. Relator's fifth contention is,

"It does not contain any written authentic plea or any waiver of trial by jury."

The indictments at Nos. 23 and 24 O & T January Sessions, 1931 each contain the following endorsement: "January 16, 1931. Defendant pleads guilty as to Dominic Palmer". The relator, by pleading guilty, waived a trial by jury by removing any issue to be triad by a jury.

6. Relator's sixth contention is,

"The Court's sentence is excessive."

Relator does not indicate wherein he believes the sentence to be excessive. The maximum sentence on the charge of Armed Robbery is twenty years. Relator was given a sentence of five to fifteen years on each offense to run consecutively.

7. Relator further avers in his petition that he was a "young, irresponsible boy", at the time of his sentence and

did not comprehend the nature of the proceedings, thereby to bring himself within the scope of *Uveges v. Pennsylvania* 335 U. S. 437, 69 S. Ct. 184, 91 L. ed. 152. The relator, at the time of his plea of guilty and sentence was twenty-two years old, and hardly a young boy. As to his lack of ex- [fol. 16] perience in criminal proceedings, the records at the Western Penitentiary show that the relator was committed to the Thorn Hill School at Warrendale on a charge of larceny on October 31, 1931, that he was paroled on April 14, 1924, and recommitted for larceny and delinquency on June 30, 1924, and discharged on June 1, 1926. On July 21, 1947, relator was committed to the Pennsylvania Training School in Morganza, Pennsylvania for breaking and entering and was paroled after serving two and one-half years. On August 4, 1930, he was returned to Morganza for parole violation and discharged on December 18, 1930. It may be noted that the offenses for which the relator is now under sentence were committed on December 18, 1930, the very day he was discharged from Morganza.

Wherefore, respondent respectfully submits that the relator is being detained in the Western State Penitentiary pursuant to the unexpired lawfully imposed sentences at No. 23 O & T 1931, and, therefore, that the prayer of relator's petitions should be denied.

And he will ever pray.

William S. Rahauser, District Attorney; Leonard H. Levenson, Assistant District Attorney.

[fols. 17-18] *Duly sworn to by Leonard H. Levenson. Jurat omitted in printing.*

[fol. 19] In the Court of Common Pleas of Allegheny County, Pennsylvania

[Title omitted]

Opinion—Filed December 8, 1949.

Rowland, P. J.:

This matter comes before the court on petition of the relator who is an inmate of the Western State Penitentiary, having been sentenced by the Court of Oyer & Terminer of Allegheny County on charges of Armed Robbery and At-

tempted Armed Robbery. The petition was received through the mail. It was ordered filed and a rule was granted on the Warden of the Western State Penitentiary and the District Attorney of Allegheny County to show cause why the writ should not issue. Answers have been made thereto.

Relator alleges that he was advised when he was taken into custody that the charge against him was breaking and entering and that he did not understand that he was pleading guilty to armed robbery. He also contends that "he pled guilty to an unnamed, unspecified charge"; that he was denied the right to learn the nature of the charge against him and was not permitted to face his accuser either in [fol. 20] the Magistrate's Office or in the Court room; that the record does not contain any written plea or waiver of trial by jury; and that the sentence is excessive.

We have the original record before us and can find no merit in relator's contentions. The records show that there was a hearing before a police magistrate of the City of Pittsburgh at which relator was present and witnesses appeared against him. He was indicted by the Grand Jury and he pleaded guilty to these indictments. This was a substantial waiver of trial by jury, as the plea removed any issue to be tried by a jury. The indictments set forth fully the charges against him and are regular on the face thereof.

We cannot agree that the sentence is excessive. The maximum penalty for armed robbery is twenty years. The relator was sentenced to not less than five nor more than fifteen years on each of the two indictments, or a total of ten to thirty years.

Relator further avers that he was "a young, irresponsible boy" who did not comprehend the nature of the proceedings and that he did not have counsel, thus bringing himself within the scope of *Uveges* vs. *Pennsylvania*, 355 U. S. 437. We do not believe that he was as ignorant of criminal proceedings as he now claims. The answer of the Warden shows that at the time of his commitment he was past twenty-one years of age and had been in trouble before. It will be noted that on July 21, 1927 (at which time he was about 18 years old) he was committed to the Pennsylvania Training School at Morganza for breaking [fol. 21] and entering and was paroled after serving two

and one-half years. On August 4, 1930 he was returned to Morganza for parole violation and discharged on December 18, 1930. It will also be noted that the offenses for which relator is now under sentence were committed *the same day*, to wit, December 18, 1930. From the answer of the Warden is appears that "because of his criminal and institutional records and other facts in his case, parole on his first bill of indictment (O&T #24 January Term, 1931, the minimum of which expired on February 18, 1936) was refused until August 26, 1942, at which time he was granted parole by the Pennsylvania Board of Parole in order to permit him to begin serving the sentence imposed on him at O&T #23 January Term 1931." It also appears from the answer of the Warden that relator was paroled on the second indictment on September 19, 1947 and was returned to that institution on April 1, 1949 as a parole violator. He was not penalized for the time spent on parole, being given full credit for that period.

In any event, we do not believe there was any obligation on the court to provide counsel for the relator. In *Commonwealth ex rel. McGlinn* vs. *Smith*, 344 Pa. 41 Mr. Justice Maxey, now Chief Justice, said (p. 48):

> "This court has never countenanced the idea that the accused in a criminal case when the charge is other than murder is being deprived of a constitutional right if he is not informed in advance of his trial that counsel will be assigned him upon request."

And, as stated in *Commonwealth ex rel. Townsend* vs. *Burke*, 361 Pa. 35, the Supreme Court of the United States has held that "the due process clause of the Fourteenth Amendment does not prohibit a State from accepting a plea [fols 22-23] of guilty in a non-capital case from an uncounseled defendant."

We have carefully read the petition, the answers filed and the record in this case and are of the opinion that relator has failed to show probable cause for his deliverance from custody. The writ will therefore be denied.

ORDER OF COURT.

December 8th, 1949, after due consideration of the petition and the record in this case, the Petition for Writ of Habeas Corpus is dismissed and the Writ is denied.

The Prothonotary is directed to mail a copy of this opinion and order of court to the Petitioner, to Stanley P. Ashe, Warden of the Western State Penitentiary, and to the District Attorney of Allegheny County. All costs to be paid by the County of Allegheny.

By the Court, Rowand, P. J.

Eo die, exception noted to the Petitioner, and bill sealed.
Harry H. Rowand, P. J., President Judge. (Seal.)

[fol. 24] In Superior Court of Pennsylvania

Writ of Certiorari and Return—Filed in County Court April 10, 1950 and Superior Court April 11, 1950

The Superior Court of Pennsylvania,
Sitting at Pittsburgh, ss:

The Commonwealth of Pennsylvania: To the Judges of the Court of Common Pleas for the County of Allegheny, Greeting:

We being willing for certain causes to be certified of the matter of the Appeal of Dominic Palmer from the order and decree of your said Court at No. 426 January Term, 1950-B wherein Commonwealth of Pennsylvania ex rel. Dominic Palmer is plaintiff and Stanley P. Ashe, Warden, Western State Penitentiary, is defendant, before you or some of you, depending, do command you, that the record and proceedings aforesaid with all things touching the same, before the Judges of our Superior Court of Pennsylvania, at a Superior Court to be holden at Pittsburgh, on the second Monday of April, 1950, so full and entire as in your Court before you they remain, you certify and send, together with this Writ, that we may further cause to be done thereupon that which of right and according to the laws of the said State ought.

Witness the Honorable Chester H. Rhodes, Doctor of Laws, President Judge of our said Superior Court, at Pittsburgh, the 21st day of January in the year of our Lord one thousand nine hundred and fifty.

Charles H. McKibben, Prothonotary.

[fol. 24a] To the Honorable the Judges of the Superior Court of Pennsylvania, sitting at Pittsburgh:

The record and process, and all things touching the same, so full and entire as before us they remain, we certify and send, as within we are commanded.

(L.S.) Frank P. Patterson, P.J. (L.S.) for H. H. Rowand, resigned.

[File endorsement omitted.]

[fol. 25] In the Superior Court of Pennsylvania, April Term, 1950

No. 58

Commonwealth of Pennsylvania ex rel. Dominic Palmer, Appellant,

v.

Stanley P. Ashe, Warden, Western State Penitentiary

Appeal from the Order of the Court of Common Pleas of Allegheny County at No. 426, January Term, 1950

No. 261

Per Curiam—Filed July 20, 1950

Relator in this habeas corpus proceeding has appealed from the order of the Court of Common Pleas of Allegheny County dismissing his petition and refusing a writ of habeas corpus.

On December 18, 1930, relator was released from the Pennsylvania Training School at Morganza, where he had been committed on July 21, 1927, for breaking and entering. He had been released from Polk State School, a mental institution, on September 10, 1920. He was committed to Thorn Hill School for larceny on October 31, 1921; after being paroled and returned, he was finally discharged on June 1, 1926. On January 9, 1931, he was indicted by a grand jury in Allegheny County on two bills of indictment: (1) Armed robbery, No. 23, January Sessions, 1931; (2) attempted armed robbery, No. 24, January Sessions, 1931.

[fol. 26] The offenses for which relator was indicted were committed on the same day of his discharge from Morganza. At the hearing before the magistrate on December 22, 1930, four witnesses for the Commonwealth appeared and testified to the commission of the crimes with which he was charged and for which he was subsequently indicted. On January 16, 1931, relator pleaded guilty in the Court of Oyer and Terminer of Allegheny County to the two bills of indictment. Entry of the pleas was noted on the indictments. The court imposed a sentence of not less than five years nor more than fifteen years in the Western State Penitentiary upon each bill, the sentence on bill No. 23 to begin at the expiration of the sentence on bill No. 24. It does not appear that relator had counsel at the time of entry of pleas and when sentenced.

Relator was released on parole from the penitentiary on September 19, 1947, and returned as a violator of parole rules on April 1, 1949. He has been given credit for that period while on parole. His maximum sentence will expire on August 26, 1957, as the result of previous action by the Pennsylvania Parole Board.

On October 11, 1949, relator filed in the Court of Common Pleas of Allegheny County his petition for writ of habeas corpus. He averred therein that his commitment was illegal for the following reasons: (1) That he pleaded guilty to an unspecified charge; (2) that his plea was illegally appropriated to other indictments; (3) that he was not permitted to learn the nature of the accusation against him; (4) that he was not permitted to face his accuser in a "magistrate's office or in the court room"; (5) that his plea contained no waiver of trial by a jury; (6) that the court's sentence was excessive.

[fol. 27] In addition thereto he averred in his petition that he was a "young irresponsible" boy, confined at one time because he was mentally abnormal; and that he was not represented by counsel or offered counsel or advised of his right to have counsel.

The first four averments are contradictory of the original record and are devoid of merit. Relator had a hearing before a magistrate of the City of Pittsburgh where he appeared and was confronted with Commonwealth witnesses. The true bills found by the grand jury were based upon the charges made in the information before the magistrate. The

pleas of guilty by relator were made in open court and entered on the bills of indictment. See Com. ex rel. Murray v. Ashe, 149 Pa. Superior Ct. 22, 26 A. 2d 217. There is no merit in relator's fifth and sixth contentions. Having pleaded guilty there was no trial, and the right to confront his accusers was not involved. The extent of the sentence was for the trial judge, and subject to the limitations prescribed by statute and ir the absence of arbitrary or capricious action the matter is within his discretion.

Relator at the time of the entry of his pleas and the imposition of sentence was past twenty-one years of age, having a criminal and institutional record. It was ten years prior to his present commitment that he had been released from the state institution at Polk. Relator in his petition makes no averment that he was impaired mentally at the time of the entry of his pleas on February 18, 1931, or that he is now suffering any mental disability. See Com. ex rel. Smith v. Ashe, 364 Pa. 93, 112, 71 A. 2d 107. His present mental capacity is indicated by his signed affidavit to the comprehensive and legalistic brief filed in this Court, [fol. 28] wherein he said "that he has read same [the brief] and knows the contents thereof."

The record does not disclose that the relator was overreached by the prosecution or prejudiced by the action of the trial court. Lack of counsel was not a denial of due process. Com. ex rel. Townsend v. Burke, 361 Pa. 35, 39, 63 A. 2d 77; Com. ex rel. Hovis v. Ashe, 165 Pa. Superior Ct. 30, 67 A. 2d 770.

The writ of habeas corpus should be allowed only when the court is satisfied that the petitioner has probable cause to be delivered. Com. ex rel. McGlinn v. Smith, 344 Pa. 41, 47, 24 A. 2d 1. On the present record the court below properly refused the writ.

The order is affirmed.

[fol. 29] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 30] IN SUPERIOR COURT OF PENNSYLVANIA

RETURN—Filed in County Court August 1, 1950

THE SUPERIOR COURT OF PENNSYLVANIA,
County of Allegheny, ss:

The Commonwealth of Pennsylvania to the Judges of the Court of Common Pleas for the County of Allegheny, Greeting:

Whereas, By virtue of our Writ of Certiorari at No. 58 of April Term, 1950 of our Court, a record in the matter of the appeal of Dominic Palmer from the order and decree of your said Court at No. 426 January Term, 1950B was brought into our Superior Court and the said cause was there so proceeded in that on the 20th day of July A. D. 1950 the following decision was rendered, viz:

The order is affirmed.

Per Curiam.

Wherefore, We hereby remit you the record aforesaid with the proceedings thereon, and all things touching the same so far as in this Court they remain, for the purpose of execution as to justice shall appertain, in accordance with the decision of our said Superior Court as aforesaid.

Witness the Honorable Chester H. Rhodes, Doctor of Laws, President Judge of our said Superior Court at Pittsburgh, the first day of August in the year of our Lord one thousand nine hundred and fifty.

Charles H. McKibben, Prothonotary.

[fol. 31] IN THE SUPREME COURT OF PENNSYLVANIA, WESTERN DISTRICT

No. 1726 A. Miscellaneous Docket

COMMONWEALTH OF PENNSYLVANIA EX RELATIONE DOMINIC PALMER

STANLEY P. ASHE, WARDEN, State Penitentiary, Western District of Pennsylvania

PETITION FOR ALLOWANCE OF APPEAL—Filed September 8, 1950

From The Order Of The Superior Court of Pennsylvania As Of No. 58 April Term, 1950 Affirming Order Of Court Of Common Pleas of Allegheny County, Discharging Rule To Show Cause And Refusing Writ Of Habeas Corpus.

Resubmission of Petition and Brief

[fol. 32] The Petitioner, Dominic Palmer, is a citizen of the United States and the Commonwealth of Pennsylvania.

He is 40 years of age and is confined in the Western State Penitentiary under two consecutive five to fifteen year sentences imposed on February 18, 1931, at No. 23 and 24 January Sessions, 1931, in the Court of Oyer and Terminer of Allegheny County.

Palmer's Petition for a Writ of Habeas Corpus, sworn to before a Notary Public and mailed to the Court on June 4, 1949, emphatically denies that he ever pled guilty to the charges set forth at No. 23 and 24 January Sessions, 1931, and alleges the denial of his constitutional rights and expressly claims that the action of the trial court lacked due process of law under the Fourteenth Amendment.

Your petitioner, not being represented by counsel and being under duress, resubmits his petition and brief for this Honorable Court's consideration, but he is unable to furnish copies of the respondents because he has not received copies, nor has he ever been permitted to examine them as provided by law.

Your petitioner believes that the opinion of the Superior Court attached hereto and filed on July 20, 1950, is based on false premises and is so unjust as to be contrary to law for the following reasons:

(a) It states that "before a magistrate on December 22, 1930, four witnesses for the Commonwealth testified

to the commission of the crime . . .'' whereas, your petitioner alleges that he was not present at said hearing because he was confined in the County Jail from December 21, 1930, until he was brought to court.

(b) It states on Page Two (2) that ''On January 16, 1931, relator pleaded guilty . . .'' but on the next page it makes much of the fact that ''Relator in his petition [fol. 33] makes no averment that he was impaired mentally at the time of the entry of his pleas on February 18, 1931.''

(c) It makes much of the fact that ''Relator in his petition makes no averment that he was impaired mentally at the time of his pleas . . .'' and on the same page belittles ''his petition that he was a young irresponsible boy . . .'' which is supported by the record of the Psychology Department of this Institution as cited in the eleventh paragraph of his brief.

(d) It attempts to minimize his allegations regarding his mental condition in 1931, by reason of fact that, ''His present mental capacity is indicated by his signed affidavit to the comprehension and legality of the brief filed in this Court.''

(e) It states that his petition was filed ''On October 11, 1949,'' but it makes no attempt to explain what transpired between June and October, or as to who violated the State and Federal laws by preventing his petition from being filed in June, 1949.

Further, if your petitioner pled guilty on January 16, 1931, as held by the Superior Court and not on February 18, 1931, the act of the Court in imposing sentence on the indictment (attached hereto) on February 18, 1931, in the absence of any order postponing, deferring, or suspending sentence during the January Term of Court, was without authority of law.

Com. ex rel. Micholetti v. Ashe, 359 Pa. 542.
Com. ex rel. Boyer v. Ashe, Docket No. 1576 (Superior Court) Opinion Filed February 18, 1949.

[fol. 34] Wherefore, your petitioner prays that your Honorable Court grant his petition so that he be not de-

prived of his constitutional rights, and so that he be not illegally restrained and deprived of his liberty.

And he will ever pray, etc.

Dominic Palmer, Petitioner.

Duly sworn to by Dominic Palmer. Jurat omitted in printing.

[fol. 35] INDICTMENT

IN THE COURT OF OYER AND TERMINER AND GENERAL JAIL DELIVERY FOR THE COUNTY OF ALLEGHENY, OF JANUARY SESSIONS, A. D. 1931

ALLEGHENY COUNTY, SS:

The Grand Inquest of the Commonwealth of Pennsylvania, now inquiring in and for the body of the County of Allegheny, upon their oaths and solemn affirmations, respectively, do present, that Dominici Palmer, Steve Conti and Clifford Mason, late of the County aforesaid, on the eighteenth day of December in the year of our Lord, one thousand nine hundred and thirty in the County aforesaid, and within the jurisdiction of this Court, being then and there armed with offensive weapons, to-wit; revolvers, with force and arms, in and upon one David Brinn feloniously did make and assault, and did then and there feloniously beat, strike and ill use the said David Brinn and do violence to said David Brinn with intent then and there to feloniously rob the said David Brinn and the sum of twenty dollars, lawful money of the Government of the United States, of the goods, moneys, chattels and property of the said David Brinn, from the person of the said David Brinn, feloniously did rob, seize, steal, take and carry away, contrary to the form of the Act of the General Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

[fol. 35a] And the inquest aforesaid, upon their oaths and solemn affirmations aforesaid do further present, that the said Dominic Palmer, Steve Conti and Clifford Mason, afterwards to wit: on the same day and year aforesaid, at the County aforesaid, and within the jurisdiction of this Court, with force and arms, the goods, moneys, chattels and property aforesaid, by some person whose name is

to said Inquest unknown then lately before feloniously stolen, taken and carried away, unlawfully, unjustly and for the sake of wicked gain, feloniously did receive and have (the said Domenic Palmer, Steve Conti and Clifford Mason, then and there, well knowing the goods, moneys, chattels and property last mentioned, to have been feloniously stolen, taken and carried away) contrary to the form of the Act of the General Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

Andrew T. Park, District Attorney for Allegheny County.

Sworn by me, C. M. Leidy, Foreman.

Test Pro Respub.: Bernard Kirley, David Brinn, John Bradley, William Ruppert, Peter Rosella, Frank Shrne, Edward Sweeney, Harvey Conners, Oscar Freund, Nuncie Marino, William Fullerton, M. Terner, Norman Amdur, Albert Good, John Barrett.

[Endorsed:] O & T. No. 23. January Sessions, 1931. Commonwealth vs. Dominick Palmer, Steve Conti, Clifford Mason. Indictment: 1st Count, Robbery. 2nd Count, Receiving Stolen Goods. Prosecutor, Bernard Kirley. On January 9, 1931. True Bill. C. M. Leidy, Foreman. The Defendpant, plead guilty as to Dominick Palmer. May 7th, 1931 Deft. pleads non cul et de hoc. Dist. Atty. similiter issue joined as to Steve Conti.

And now February 18, 1931, Defendant sentenced to pay a fine of 6¼ cts., to the Commonwealth. Pay costs of prosecution; and undergo an imprisonment of not less than 5 years or more than 15 years in the Western Penitentiary and stand committed. To begin at the expiration of sentence at No. 24 January Term 1931 as to Dominic Palmer.

Not Guilty as to Steve Conti.

February 3, 1936 at request of prosecutor; made in Open Court and upon motion of District Attorney, a nolle prosse allowed on payment of costs of prosecution by County by reason of no evidence as to Clifford Mason.

From the Record:

Attest: John J. McLean, Clerk of Courts.

[fol. 36] INDICTMENT

IN THE COURT OF OYER AND TERMINER AND GENERAL JAIL DELIVERY FOR THE COUNTY OF ALLEGHENY, OF JANUARY SESSIONS, A. D. 1931.

ALLEGHENY COUNTY, SS:

The Grand Inquest of the Commonwealth of Pennsylvania, now inquiring in and for the body of the County of Alleghony, upon their oaths and solemn affirmations, respectively, do present, that Dominic Palmer, Steve Conti and Clifford Mason, late of the County aforesaid, on the eighteenth day of December in the year of our Lord, one thousand nine hundred and thirty in the County aforesaid, and within the jurisdiction of this Court, being then and there armed with offensive weapons, to-wit: revolvers, with *with* force and arms, in and upon one Peter Rosella feloniously did make and assault, and did then and there feloniously beat, strike and ill use the said Peter Rosella and do violence to said Peter Rosella with intent then and there to feloniously rob the said Peter Rosella and of the goods, moneys, chattels and property of the said, from the person of the said, feloniously did rob, seize, steal, take and carry away, contrary to the form of the Act of the General Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania

[fol. 37] And the inquest aforesaid, upon their oaths and solemn affirmations aforesaid do further present, that the said afterwards to wit: on the same day and year aforesaid, at the County aforesaid, and within the jurisdiction of this Court, with force and arms, the goods, chattels and property aforesaid, by some person whose name is to said Inquest unknown then lately before feloniously stolen, taken and carried away, unlawfully, unjustly and for the sake of wicked gain, feloniously did receive and have (the said then and there, well knowing the goods, —, chattels and property last mentioned, to have been feloniously stolen, taken and carried away) contrary to the form of the Act of the General Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

Test Pro Respub: Bernard Kirley, Peter Rosella, John Bradley, William Rupert, David Brinn, Frank Shine, Ed-

ward Sweeney, Harvey Conners, Oscar Freund, Nuncie Marino, William Fullerton, M. Terner, Norman Amdur, Albert Good.

Andrew T. Park, District Attorney for Allegheny County.

Sworn by me C. M. Leidy, Foreman.

And now February 18, 1931. Defendant sentenced to pay a fine of 6¼ cts. to the Commonwealth. Pay costs of prosecution; and undergo an imprisonment of not less than 5 years or more than 15 years in the Western Penitentiary and stand committed as to Dominic Palmer.

Not guilty as to Steve Conti.

And now February 3rd, 1936, at request of prosecutor; made in Open Court and on motion of District Attorney a nolle prosse allowed on payment of costs of prosecution by County by reason of not sufficient evidence to sustain a conviction as to Clifford Mason.

From the Record. Attest:

John J. McLean, Clerk of Courts.

[Endorsed]: O & T. No. 41. January Sessions, 1931. Commonwealth vs. Dominic Palmer, Steve Conti, Clifford Mason, Indictment: 1st Count, Attempted Robbery. Prosecutor, Barnard Kirley. On January 9, 1931. True Bill. C. M. Leidy, Foreman. January 9, 1931. The Defendant, pleads guilty as to Dominic Palmer. May 7th, 1931, Deft. pleads non cul et de hoc. Dist. Atty., similtier issue joined, as to Steve Conti.

[fol. 38] IN THE SUPERIOR COURT OF PENNSYLVANIA, WESTERN DISTRICT

[Title omitted]

BRIEF FOR APPELLANT

[fol. 39] Statement of Questions to Be Argued

1. Where a prisoner is given a hearing before a Magistrate on a charge of burglary and enters a plea of guilty in open court under the belief that he is pleading guilty to that charge alone, may his plea be illegally appropriated to other un-read indictments on which no hearing was had?

(The Court below held yes.)

2. May a feeble-minded prisoner waive his right to a jury trial on indictments un-read by or to him, by entering a plea of guilty to an un-specified indictment?

(The Court below held yes.)

3. Does not the Constitution place the onus on the trial Judge to appoint counsel for an abnormal feeble-minded boy, or to advise him of his right to have counsel and to instruct or advise him of the serious consequences of his plea?

(The Court below held no.)

[fol. 40] History of the Case

This is an appeal from an order of the Court of Common Pleas of Allegheny County at No. 426 January Term, 1950-B. The order which was entered on December 8, 1949, denied the appellant's application for a writ of habeas corpus.

(See opinion filed on December 8, 1949.)

The appellant, Dominic Palmer, under the date of February 18, 1931, was sentenced to a term of not less than ten years nor more than thirty years in the Western State Penitentiary at Nos. 23 and 24 January Sessions, 1931, in the Court of Oyer and Terminer of Allegheny County.

The certified copy of the indictments show that he was charged with Robbery and Attempted Robbery.

There is a notation on the back of the indictments showing that appellant's co-defendant Steve Conti was found not guilty on May 7, 1931, and that the indictments were nolle prossed as to Clifford Mason on February 3, 1936, because of the lack of evidence.

The notes of the testimony taken at the time of Conti's trial show that he was a patient in a State mental institution at the time of the averred crimes, and that the appellant was rebuked by the trial Judge when he testified and denied any knowledge of the charges for which he had been sentenced.

The Petition for Writ of Habeas Corpus filed on June 4, 1949, alleges that Palmer spent several years in Polk (because he was mentally abnormal), as well as several years in Morganza, and that after being taken in custody by the police authorities of the City of Pittsburgh on December

20, 1930, he was confined in No. 6 Police Station on Broad Street, Pittsburgh, and on December 21, 1930, he was taken to the Allegheny County Jail. (Paragraph 2.)

[fol. 41] The Petition alleges that Palmer was then taken from the County Jail to a courtroom where the District Attorney informed the Court, that the defendant wished to plead guilty and that in the matter of a minute, the foregoing sentence was entered after he answered "Yes" to the Court's query "Do you plead guilty to this charge?" (Paragraph 3.)

The Petition alleges that the appellant was advised by the police authorities, when he was taken in custody, that the charge against him was breaking and entering the Leaders Dry Goods Store on Frankstown Ave. (Paragraph 4) and that he was not aware of the fact that he had been held to a charge of Robbery or Attempt Robbery until he was in the Western State Penitentiary being examined by the Psychology Department of this institution (Paragraph 5).

The Petition alleges that Palmer was not advised of and was ignorant of the charges against him (Paragraph 7) because he was advised at the time of his hearing before Magistrate Papale that the charge against him was breaking and entering and that at no time thereafter was he advised or apprised of any other charge against him until he was in the penitentiary (Paragraph 6).

The appellant was not represented by counsel, nor offered counsel, or advised of his right to have counsel, and he expressly claims that the trial court lacked due process of law under the Fourteenth Amendment of the Constitution of the United States (Paragraph 8).

The records in the Psychology Department of this institution show that he was twenty-one years of age; that he had an I.Q. of 74; that he had a mental age of an eleven year old boy and was classified as feeble minded. The record shows that he was released on parole on September 19, 1947, [fol. 42] and that he was returned on April 1, 1949, for no other reason than because he lacked a place of employment.

The answers of the District Attorney of Allegheny County and Warden Stanley P. Ashe, have not been furnished to the appellant and he has no knowledge of what admissions or denials are set forth therein.

The Petition further alleges that the appellant plead guilty to an unspecified charge (Paragraph 10a); that his

plea to an unspecified charge was illegally appropriated to other unread indictments (Paragraph 10b); that this deprived him of his right to learn the nature of the accusation against him either before a Magistrate or in a courtroom (Paragraph 10c); that he was deprived of his right to face his accuser before a Magistrate or in a courtroom (Paragraph 10d); and that the record does not contain any authentic plea or written waiver of his right to a trail by jury (Paragraph 10e).

That founded as his Petition is that he plead guilty to entering the Leaders Dry Goods Store and larceny, the courts sentence is excessive.

Assignment of Errors

1. The Common Pleas Court erred in entering the following order:

> "December 8, 1949, after due consideration of the petition and the record in this case, the petition for Writ of Habeas Corpus is dismissed and the Writ is denied.
>
> By the Court
>
> "Eo die, exception noted to the Petitioner, and bill sealed.
>
> Harry Rowand, P.J."

[fol. 43]

Argument

This is a case where a feeble-mined boy was arrested on the roof of the Leaders Dry Goods Store in possession of socks and other articles of men's clothing. He was given a hearing before a Magistrate and was held for court. After several months in the County Jail he was brought to a courtroom where the District Attorney informed the court that "he wished to plead guilty". The trial judge held several pairs of socks in his hand and queried, "Do you plead guilty to this charge?" He answered "Yes" and was sentenced to thirty years imprisonment in the Western State Penitentiary.

No indictments were read to him or by him before he entered his plea or before he was sentenced.

No mental examination was ordered by the court and no motion was made for a mental examination because he

was not represented by counsel, nor offered counsel, or advised of his right to have counsel.

He later learned, from the Penitentiary authorities, that he was sentenced for Robbery and Attempted Robbery.

He was brought back to court to testify in co-defendant's trial and was rebuked by the trial Judge because he emphatically denied any knowledge of the crimes for which he had been sentenced.

Accordingly, the sole question involved in this proceeding is not only whether the trial court lacked due process of law in failing to appoint, or to offer, or to advise a feeble-minded boy of his right to have counsel, but whether a feeble-minded boy could legally waive his right to a jury trial in the absence of counsel to unread indictments by entering a plea of guilty to an unspecified indictment.

[fol. 44] It is the very essence of due process of law in a criminal prosecution that the accused be informed of the nature and cause of the accusation against him.

U.S. Const. Amend. VI., Pa. Const. Art. 1, Sec. 9.

In defining the essentials necessary to the protection of the accused as to waivers of Grand Jury indictment and guilty pleas, this Court, in Com. ex rel. Fagan v. Franicis, 53 Pa. Super. Ct. 278, said:

> "It is essential to the protection of the accused in his right to be informed as to the precise accusation to which he is to plead, and if convicted by his own confession, as to the precise crime and the lawful punishment prescribed therefore for which he is to be sentenced."

In Com. ex rel. Thor v. Ashe, No. 122 Misc. Docket, in an opinion filed on January 20, 1940, this Court said:

> "The relator denies that he ever pleaded guilty to the indictment in Cambria County and seems to have been consistent in this position, but his counsel does not press the point in this proceeding and accepts the record in the docket as verity. While it may not be required—and we are informed it is not the practice in Cambria County to enter pleas on the indictment, we approve of the practice, especially in cases where the defendant pleads guilty. In such cases the plea of guilty should be endorsed on the indictment and

> *signed* by the defendant, if unable to sign his *name or* his *mark* should be made and *witnessed* by the clerk. Such a course would eliminate all questions on the subject.

All of this makes sense. Surely the accused has the right to know why he is being sentenced if he is to be convicted by his own confession. And surely due process requires reading of the indictment if it is to be signed by the accused. It is equally clear that due process is violated if the all-important guilty plea is endorsed on an unread unsigned indictment. The day shall not come when the Commonwealth of Pennsylvania may proceed against one [fol. 45] of its citizens with impunity while depriving him of his right to be informed of the nature and cause of the accusation against him.

There is authority in the Act of 1895, May 15, P.L. 71, for the proposition that an accused person may plead guilty orally or in writing after reading the indictment.

There is also authority in the Act of 1935, June 11, P.L. 319, for the proposition that the accused may waive his right to a jury trial in writing and for any offense not punishable by more than ten years imprisonment.

No authority exists in law by which an accused person could waive his right to a jury trial in 1931 to unread indictments by pleading guilty to an unspecified indictment.

The right to be informed of the nature and cause of the accusation, and the right to a jury trial, is no less inherent or inalienable than the right to be present at the rendition of the verdict.

Com. ex rel. Milewski v. Ashe, 362 Pa. 48.

Surely this court would not hold that other steps, e.g. the acceptance of a guilty plea or the examination of witnesses, in the trial of a mentally deranged defendant may properly be taken without consent of his lawyer or in his absence from the courtroom. That would violate due process. So did the procedure in this case. As the Supreme Court of the United States said in Uveges v. Pennsylvania, 355 U. S. 437:

> "Some members of the Court think that where serious offenses are charged, failure of a court to offer counsel in State criminal trials deprives an accused of

rights under the Fourteenth Amendment. They are convinced that the services of counsel to protect the [fol. 46] accused are guaranteed by the Constitution in every such instance. (See Bute v. Ill., 333 U.S. 640, dissent, 677-79.) Only when the accused refused counsel with an understanding of his rights can the court disperse with counsel. (See Rice v. Olson, 324 U.S. 786, 788-89; Walker v. Johnston 312 U.S. 275, 286; Johnson v. Zerbst, 304 U.S. 485, 468). Others of us think that when a crime subject to capital punishment is not involved, each case depends on its own facts. (See Betts v. Brady, 136, U.S. 455, 462). Where the gravity of the crime and other factors—such as the age and education of the defendant, (See e.g. Wade v. Mayo, 334, U.S. 672, 683-84; DeMeerler v. Mich., 329 U.S. 663, 664-65; Betts v. Brady, supra at 472; Powell v. Ala., 287 U.S. 45, 51-52, 71) the conduct of the court or the prosecuting officials, (See e.g. Townsend v. Burke, 334 U.S. 736, 739-41; Smith v. O'Grady, 312 U.S. 329, 332-337) and the complicated nature of the offense charged and possible defenses thereto (See e.g. Rice v. Olson, 324 U.S. 786, 789-91) render criminal proceedings without counsel so apt as to result in injustices as to be fundamentally unfair, the latter group hold that the accused must have legal assistance, under the Amendment whether he pleads guilty or elects to stand trial, whether he requests counsel or not. Only a waiver of counsel, understandingly made, justifies trial without counsel."

Surely such a decision applies to a case where the record affirmatively shows that an uncounseled uneducated feeble-minded boy was tricked into entering a plea of guilty to unread indictments, plus a record showing his co-defendants were exonorated because they were represented by counsel and that he was rebuked by Conti's trial Judge because he denied guilt.

And surely such a decision applies where the Petition avers that he was not afforded counsel, nor advised of his right to have counsel, or in any way instructed by the Court as to the consequences of his plea, coupled, as in this case, with a Court opinion which admits the truth of the aver-

ment. As the United States Supreme Court, in Uveges v. Pennsylvania, supra, said:

[fols. 47-48] "Under either view of the requirements of due process, the facts in this case required the presence of counsel at petitioner's trial. He should not have been permitted to plead guilty without an offer of the advice of counsel in his situation. If the circumstances alleged in his petition are true, the accused was entitled to an adviser to help him handle his problems. Petitioner was young and in-experienced in the intricasies of criminal procedure when he pleaded guilty to crimes which carried a maximum sentence of eighty years. There is an undenied allegation that he was never advised of his right to counsel. The record shows no attempt on the part of the court to make him understand the consequences of his plea. Whatever our decision might have been if the trial court had informed him of his rights and conscientiously had undertaken to perform the functions ordinarily entrusted to counsel, we conclude that the opportunity to have counsel in this case was a necessary element to a fair hearing."

It is submitted by the appellant, that because he lacked counsel and an education, he has served, as a matter of law, nineteen years imprisonment for crimes which he did not commit.

Conclusion

Appellant submits that the Court of Common Pleas of Allegheny County violated the due process clause of the 14th Amendment in the opinion it rendered dissenting from the law as enunciated by the United States Supreme Court. Appellant should have been given an opportunity to prove his allegations in open court and he should be released from further confinement.

Respectfully submitted, —— ——

[fol. 49] No. 1726A Miscellaneous Docket. E Pa. 288 (West Dist.) Commonwealth of Pennsylvania, Ex Relatione Dominic Palmer, v. Stanley P. Ashe, Warden, State Penitentiary, Western District of Pennsylvania. Petition for Allowance of Appeal. E 9-28-50. Petition denied. Per Curiam.

[fol. 50] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. 273, Misc.

ORDER—April 30, 1951.

On consideration of the motion for leave to proceed herein *in forma-pauperis* and of the etition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 707.

It is further ordered that the duly certified copy of the transcript of the proceedings below shall be treated as though filed in response to such writ.

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OCT 23 1951
CHARLES ELMORE CROPLEY
CLERK

COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 38

DOMINIC PALMER,

Petitioner,

vs.

P. ASHE, WARDEN, WESTERN STATE PENITENTIARY, PITTSBURGH, PA.,

Respondent

ERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

BRIEF FOR THE PETITIONER

LOUIS B. SCHWARTZ,
Counsel for Petitioner.

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Sec. 2223 (murder in the second degree)	18
Sec. 2261 (rape)	19
Sec. 2891 (simple robbery)	19
Sec. 2892 (aggravated robbery)	18
Sec. 3041 (burglary)	19
Sec. 3741 (preserving common law crimes)	21
Pennsylvania Penal Code of 1939, 18 Purd. Pa. Stat. Ann. (1945), Sec. 5101 (preserving common law crimes)	21

Other Authorities:

Encyclopaedia Britannica (14th ed.), Vol. 12	14
Louttit, Clinical Psychology (1936)	14
Michael and Wechsler, Criminal Law and Its Administration (1940), chapter V	21
Noyes, Modern Clinical Psychiatry (1948)	14
Sutherland, Principles of Criminology (1947 ed.), chapter 17	16
Stern and Gressman, Supreme Court Practice (1950)	7
Wolfson and Kurland, Jurisdiction of the Supreme Court (1951)	7

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 38

DOMINIC PALMER,

Petitioner,

vs.

STANLEY P. ASHE, WARDEN, WESTERN STATE PENITENTIARY, PITTSBURGH, PA.,

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

BRIEF FOR THE PETITIONER

Opinions Below

The Supreme Court of Pennsylvania did not file an opinion. Its order refusing to allow an appeal from the decision of the Superior Court of Pennsylvania is printed at R. 30. The Superior Court of Pennsylvania had affirmed the judgment of the Court of Common Pleas of Allegheny County, dismissing Palmer's petition for habeas corpus. The per curiam opinion of the Superior Court appears at 167 Pa. Super. 88, 74 A. 2d 725 (1950), and is reproduced at R. 14.

Jurisdiction

Jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U. S. Code, Secs. 1254(a) and 1257(3), to review the final judgment of the Supreme Court of Pennsylvania rejecting petitioner's claim that he is imprisoned in violation of the due process clause of the Fourteenth Amendment. Petitioner's motion for leave to proceed *in forma pauperis* and his petition for certiorari were granted on April 30, 1951 (R. 31).

Questions Presented

1. May a state court, consistently with the Fourteenth Amendment, sentence a 21 year-old defendant to 10-30 years imprisonment on indictments for armed robbery, without providing or offering him counsel, where:

(a) the defendant had been almost continually confined in mental and correctional institutions between the ages of 8 and 21;

(b) the indictments were not read or explained to the defendant;

(c) the recorded plea of guilty was tendered by the defendant under the misapprehension, resulting from police misrepresentations, that the charge was breaking and entering a store, an offense entirely unrelated to the crimes charged in the indictments; and

(d) the presumption of prejudice from denial of counsel is confirmed by the circumstances of defendant's trial and by the acquittal of his codefendants who did not plead guilty?

2. Does a state's post-conviction review procedure meet the test of Federal due process, if:

(a) it denies a hearing to determine whether an uncounseled twenty-one-year-old mentally deficient defendant

understood the charges to which he pleaded guilty; and

(b) it treats an endorsement on an indictment by a court clerk, to the effect that the named defendant pleaded guilty, as an incontrovertible record that such defendant understandingly pleaded guilty to the charge specified in the indictment.

Statute Involved

The robbery statutes in force in Pennsylvania at the time of petitioner's guilty plea are reproduced in the Appendix, p. 30.

Statement

Petitioner, Dominic Palmer, now forty-one years old, is serving the second of two consecutive sentences for aggravated robbery imposed upon him by the Court of Oyer and Terminer of Allegheny County, Pennsylvania, on February 18, 1931, upon a plea of guilty. Palmer received a sentence of five to fifteen years and a fine of 6¼ cents under indictment No. 24 of January Term, 1931 (the Rosella robbery), and a like sentence under indictment No. 23 of the same term (the Brinn robbery) (R. 5, 21, 23). It is conceded that Palmer neither had nor was offered counsel when the plea of guilty was entered. The circumstances bearing upon the propriety of accepting that plea from the defendant are as follows, the facts stated being taken from the undenied averments of the petition for habeas corpus or from the answers thereto filed by the warden and the district attorney, except as otherwise indicated.

Petitioner's Background. (R. 5-6) Petitioner was born December 18, 1909. He was in a Pittsburgh orphanage in 1916-1917. On August 12, 1918, when he was not yet nine years old, he was committed for an indeterminate period to Polk State School as an imbecile. He was released two years and one month later, September 10, 1920. On October

31, 1921, before he was twelve, he was again committed for an indeterminate period to the Thorn Hill School on a charge of larceny. It does not appear how long he may have been detained prior to that commitment while juvenile delinquency proceedings were pending against him. He remained at Thorn Hill for four and one-half years except for a two-month interval of unsuccessful parole. Upon his release from Thorn Hill he was at large for approximately a year, between the ages of 16½ and 17½. On July 21, 1927, he was once more committed—this time to the Pennsylvania Training School at Morganza, Pennsylvania—on a charge of breaking and entering. He emerged from Morganza three and one-half years later (there was a short parole interruption at some point during this sentence) on December 18, 1930, his twenty-first birthday. On the same day occurred the alleged crimes for which he is presently confined.

Arrest, Trial, Plea and Sentence. Palmer was arrested on December 20, 1930, and held in No. 6 Police Station Pittsburgh. His petition for habeas corpus filed in the present proceedings alleged, without contradiction by the answers, that the arresting officers told him he was charged with "breaking and entering the Leaders Dry Goods Store on Frankstown Avenue" (R. 3, 26-27). An information lodged by Police Inspector Kirley on December 22, 1930 (R. 8-9), charged Palmer and others with two robberies committed on December 18, 1930, one against David Brinn, the other against Peter Rosella. No preliminary hearing was held until December 23, 1930, three days after the arrest (R. 9). The petition for habeas corpus alleges (Par. 6, R. 3) that Palmer was advised at the magistrate's hearing that he was charged with breaking and entering and that he was never thereafter apprised of any other charge. The District Attorney's answer does not con-

trovert this allegation, but merely states the fact, noted above, that the written information or complaint filed by Police Inspector Kirley on December 22 charged Palmer and the others with the Brinn and Rosella robberies (R. 8-9). Palmer was remanded to the Allegheny County jail where he remained until his trial (Pars. 2 and 3 of the petition, R. 2-3).

On January 9, 1931, the Grand Jury returned indictments against Palmer, Steve Conti and Clifford Mason, charging them jointly with armed robbery in the Brinn and Rosella affairs (R. 20-23). On February 18, 1931, Palmer was arraigned, without counsel or offer of counsel. He did not receive copies of the indictments nor were they shown or read to him (Par. 7 of the petition, R. 3). The district attorney informed the court that "the defendant wishes to plead guilty." The court inquired "Do you plead guilty to this charge?" Palmer answered "Yes", having in mind the charge of breaking and entering Leaders Dry Goods Store (Pars. 3 and 4 of the petition, R. 3). The district attorney's answer does not directly contradict these allegations as to Palmer's misunderstanding of the charge. The answer refers to the "records" in Nos. 23 and 24 O and T, January Sessions, 1931, which are said to "clearly indicate" that Palmer pleaded to "specific" charges. The answer then sets forth excerpts from the indictments "to which the relator pleaded guilty" (R. 7-8). The immediately following averment of the answer shows what was meant by the records which "clearly show" that Palmer pleaded guilty to the Brinn and Rosella robberies: the *court clerk* had endorsed on the back of each indictment a notation that the accused had pleaded guilty (R. 8, 21, 23). This, of course, is no contradiction of Palmer's allegation that, without having the indictments read to him and without being informed of their contents, he indicated a willingness to plead guilty because he believed, as the ar-

resting officers had told him, that he was being prosecuted for breaking and entering Leaders Dry Goods Store. The allegation of the petition for habeas corpus that Palmer did not know of the robbery charges until he learned of them during his psychological examination after his arrival at the Western State Penitentiary (R. 3) is nowhere denied.

As previously stated, Palmer was sentenced to five to fifteen years and a fine of 6¼ cents on indictment No. 24 (Rosella), and a like sentence on No. 23 (Brinn), service of the latter sentence to begin on expiration of the former (R. 6, 21, 23). Conti, who was represented by counsel, pleaded not guilty and was acquitted on May 7, 1931 (R. 21, 23, 24). The indictments were dismissed as to Mason on motion of the District Attorney on February 3, 1936, "by reason of no evidence as to Clifford Mason" (R. 21; cf. R. 23). Petitioner served eleven years on the first sentence before he was "paroled" in order to permit him to start serving the second sentence (R. 5). He was paroled under the second sentence on September 19, 1947, but was taken into custody again a year and one-half later and recommitted, not for any criminal act, but as "a violator of parole rules", viz., lack of a place of employment (Par. 9 of the petition for habeas corpus, R. 3, 25; Par. 4 of the warden's answer, R. 5). The sentence he is presently serving will not expire until August 26, 1957 (Par. 3 of the warden's answer, R. 5).

The Habeas Corpus Proceedings. Palmer was not represented by counsel at any stage of the present habeas corpus proceedings prior to the assignment of counsel by this Court after certiorari had been granted. He mailed his petition for habeas corpus to the Court of Common Pleas of Allegheny County. It was filed as of October 11, 1949, on which day a rule issued requiring the warden and the district attorney to show cause why habeas corpus should not issue (R. 2). Although the rule was returnable on

October 20, answers were not filed until December 8, 1949 (R. 1, 4, 6). It does not appear that the answers or copies thereof were ever delivered or shown to the petitioner, and petitioner specifically denied having seen them, in his brief in the Superior Court of Pennsylvania (R. 25). On the same day that the answers were filed, and without a hearing, County Judge Rowand filed his opinion and order denying the writ (R. 10-13). Judge Rowand held that Palmer, being twenty-one at the date of his trial and having been "in trouble" before, was not "as ignorant of criminal proceedings as he now claims" (R. 11), but that, "in any event", there was no obligation to furnish counsel in a non-capital case (R. 12). The Superior Court affirmed in a per curiam opinion, on substantially the same grounds (R. 14-16). The Supreme Court of Pennsylvania denied, without opinion, a petition for allowance of appeal from the Superior Court (R. 30).

Since jurisdiction of the Supreme Court of Pennsylvania is "imperative" where a substantial constitutional question is presented—*Commonwealth* v. *Caulfield*, 211 Pa. 644, 61 Atl. 243; cf. *Boyle's License*, 190 Pa. 577, 42 Atl. 1117 and *Commonwealth* v. *Gardner*, 297 Pa. 498, 147 Atl. 527—the dismissal of the petition for allowance of appeal constitutes a final disposition on the merits, and not a mere discretionary refusal to exercise the power of review. *Uveges* v. *Pennsylvania*, 335 U.S. 437; *Tumey* v. *Ohio*, 273 U.S. 510, 515; see Stern and Gressman, Supreme Court Practice (1950) 74-75; Wolfson and Kurland, Jurisdiction of the Supreme Court (1951) 93-94. It is presumed, in the absence of an opinion of the Supreme Court of Pennsylvania, that that Court considered the Federal constitutional issues raised by the petitioner at every stage of the proceedings. *Townsend* v. *Burke*, 334 U.S. 736, 737, footnote 1; *Gryger* v. *Burke*, 334 U.S. 728, 729, footnote 2; *cf. Williams* v. *Kaiser*, 323 U.S. 471, 478. There is no question

in this case as to the scope of the issues that were passed upon by the Supreme Court of Pennsylvania (cf. dissenting opinions in the *Uveges* case, *supra*) because the petition for allowance of appeal explicitly claimed the protection of the Fourteenth Amendment, and incorporated the petition for habeas corpus and the brief filed in the Superior Court, reiterating constantly the claimed denial of Federal due process (R. 18). *Cf. Gibbs* v. *Burke*, 337 U.S. 773, 779 ("the Federal question was adequately if inartistically raised"). It is not questioned that habeas corpus was the proper method of testing the constitutionality of Palmer's conviction. See *Commonwealth ex rel. McGlinn* v. *Smith*, 344 Pa. 41, 24 A. 2d 1; *Commonwealth ex rel. Penland* v. *Ashe*, 341 Pa. 337, 19 A. 2d 464; *Gibbs* v. *Burke*, 337 U.S. 773; 779; *Uveges* v. *Pennsylvania*, 335 U.S. 437, 439. The propriety of Palmer's continued imprisonment is therefore squarely before this Court on the merits.

Specification of Errors

The Supreme Court of Pennsylvania erred:

1. in holding that due process did not require the trial judge to offer or provide counsel to a feeble-minded 21 year old youth charged with aggravated robberies, in the circumstances of this case.

2. in upholding the dismissal, without hearing, of a petition for habeas corpus, where the petition alleged that the petitioner was misled by the police and other officials into pleading guilty to robberies with which he had no connection, and the accused, not having the assistance of counsel nor copies of the indictment, believed himself to be charged with a different, unrelated, lesser offense.

Summary of Argument

It is settled by the decisions of this Court that due process requires a state criminal court to tender the assistance of counsel to one accused of serious offenses and incapable, by reason of youth, inexperience, mental deficiency or otherwise, of defending himself adequately.

Petitioner Dominic Palmer was manifestly incapable of coping with two complicated indictments charging aggravated robberies for which he could have been sentenced to 40 years' imprisonment and was actually sentenced to a maximum of 30. He was barely 21 years old at the time of his trial, had been confined at one time as an "imbecile", and had been in and out of mental and correctional institutions between the ages of 8 and 21. The undenied allegations of the petition state that Palmer was told, at the time of arrest and at the magistrate's hearing, that he was charged with breaking and entering Leaders Dry Goods Store. In fact, he was indicted together with two other men for aggravated robberies alleged to have been perpetrated on one Brinn and one Rosella. No copies of the indictments were provided, nor were they read nor explained to him. No counsel was offered or provided. In a proceeding lasting "a minute, more or less" the District Attorney told the trial judge that Palmer wished to plead guilty and Palmer assented, believing he was pleading to the Leaders Store charge. He did not learn the truth until his arrival in the penitentiary.

The answers to the petition, without directly contradicting any of the foregoing, merely aver that the "record", consisting of the court clerk's entry of the plea of guilty on the back of the indictments, shows that Palmer pleaded guilty to "specific" charges. The petition was dismissed without hearing.

The case is governed by *Uveges* v. *Pennsylvania*, 335 U.S. 437. It is a plain and shocking violation of fundamental decencies in criminal proceedings.

Argument

I

THE FAILURE TO PROVIDE COUNSEL AND THE ACCEPTANCE OF A GUILTY PLEA, UNDER ALL THE CIRCUMSTANCES OF THIS CASE, DENIED PETITIONER DUE PROCESS OF LAW.

The present case is hardly to be distinguished from *Uveges* v. *Pennsylvania*, 335 U.S. 437. That case arose on habeas corpus in Allegheny County, Pennsylvania, as did this one. There a youth of 17 was charged with four burglaries, pleaded guilty without offer or provision of counsel, and was sentenced to 20-40 years. Here, a feeble-minded youth of 21 was indicted on two counts of armed robbery and sentenced to 10-30 years. There the defendant had previously been prosecuted for burglary, and served a ten month sentence. Here, defendant had served a term in the reformatory for breaking and entering, and before that had been in and out of a series of institutions for dependent, delinquent and mentally defective children. There, as here, the Court of Common Pleas of Allegheny County subsequently denied a petition for habeas corpus without a hearing, despite the failure of the answers to contradict material allegations of the petition which, if believed, entitled the prisoner to his release. Here, as there, the perfunctory dismissal of the petition for habeas corpus was upheld first by the Superior Court and then by the Supreme Court of Pennsylvania.

While the instant case might, therefore, be reversed on the controlling authority of the *Uveges* case, petitioner submits below a more detailed analysis of the facts and the relevant law. We take as our starting point Mr. Justice

Reed's statement in the *Uveges* case of the law as to defendant's right under the due process clause to assistance of counsel in state prosecutions:

> "Some members of the Court think that where serious offenses are charged, failure of a court to offer counsel in state criminal trials deprives an accused of rights under the Fourteenth Amendment. They are convinced that the services of counsel to protect the accused are guaranteed by the Constitution in every such instance. See *Bute* v. *People of Illinois*, 333 U.S. 640, dissent, 677-679, 68 S. Ct. 763, 782, 783. Only when the accused refuses counsel with an understanding of his rights can the court dispense with counsel. Others of us think that when a crime subject to capital punishment is not involved, each case depends on its own facts. See *Betts* v. *Brady*, 316 U.S. 455, 462, 62 S. Ct. 1252, 1256, 86 L. Ed. 1595. Where the gravity of the crime and other factors—such as the age and education of the defendant, the conduct of the court or the prosecuting officials, and the complicated nature of the offense charged and the possible defenses thereto—render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair, the latter group hold that the accused must have legal assistance under the Amendment whether he pleads guilty or elects to stand trial, whether he requests counsel or not. Only a waiver of counsel, understandingly made, justifies trial without counsel.
>
> "The philosophy behind both of these views is that the due process clause of the Fourteenth Amendment or the Fifth Amendment requires counsel for all persons charged with serious crimes, when necessary for their adequate defense, in order that such persons may be advised how to conduct their trial. The application of the rule varies as indicated in the preceding paragraph.
>
> "Under either view of the requirements of due process, the facts in this case required the presence of counsel at petitioner's trial. He should not have been permitted to plead guilty without an offer of the advice

of counsel in his situation. If the circumstances alleged in his petition are true, the accused was entitled to an adviser to help him handle his problems. Petitioner was young and inexperienced in the intricacies of criminal procedure when he pleaded guilty to crimes which carried a maximum sentence of eighty years. There is an undenied allegation that he was never advised of his right to counsel. The record shows no attempt on the part of the court to make him understand the consequences of his plea. Whatever our decision might have been if the trial court had informed him of his rights and conscientiously had undertaken to perform the functions ordinarily entrusted to counsel, we conclude that the opportunity to have counsel in this case was a necessary element of a fair hearing."

See also *Gibbs* v. *Burke*, 337 U.S. 773, 780.

II

PALMER'S YOUTH, IGNORANCE AND MENTAL DEFICIENCY RENDERED HIM INCAPABLE OF ADEQUATELY DEFENDING A SERIOUS CRIMINAL CHARGE; TRIAL WITHOUT COUNSEL WAS "SO APT TO RESULT IN INJUSTICE AS TO BE FUNDAMENTALLY UNFAIR".

In dealing with the deeply troubling problem of defining the situations which justify intervention by this Court to guarantee assistance of counsel in state prosecutions, no circumstance has been more consistently relied upon than the intellectual incapacity of the defendant, as evidenced by his youth, inexperience, lack of education or mental defect. *Powell* v. *Alabama*, 287 U.S. 45, 69; *House* v. *Mayo*, 324 U.S. 42, 45 ("in his twenties, uneducated and a stranger in the town"); *Carter* v. *Illinois*, 329 U.S. 173, 178 (relief denied absent allegations on "maturity or capacity of comprehension"); *Marino* v. *Ragen*, 332 U.S. 561; *De Meerleer* v. *Michigan*, 329 U.S. 663; *Bute* v. *Illinois*, 333 U.S. 640, 671 (relief denied absent claim of "abnormality, intoxication, or insanity"); *Wade* v. *Mayo*, 334 U.S. 672, 683-4 ("age,

ignorance or mental capacity"); *Uveges* v. *Pennsylvania*, quoted *supra; Gibbs* v. *Burke, supra.*

The only case in which this Court has refused to intervene when a youthful defendant pleaded guilty without counsel is *Canizio* v. *New York*, 327 U.S. 82, where the defendant actually had counsel after his plea was entered and before sentence. A majority of the Court were satisfied that the trial judge, in obedience to New York statutes, had advised petitioner of his right to counsel at the time of his arraignment, that defendant's counsel had actively represented his client, and that he could have withdrawn the plea of guilty without prejudice had he considered that advisable in his client's interest. Disregarding the *Canizio* case, therefore, the Court's decisions against the claimed constitutional right have all involved men not less than 30 years old, insofar as age may be determined from the opinions. *Gryger* (34) v. *Burke*, 334 U. S. 728; *Bute* (57) v. *Illinois*, 333 U. S. 640; *Betts* (43) v. *Brady*, 316 U. S. 455; *Carter* (30) v. *Illinois*, 329 U. S. 173; *Foster* (34) v. *Illinois*, 332 U. S. 134. In none of these cases was there any suggestion that the defendant was mentally deficient.

On the record of the instant case petitioner's mental capacity was clearly inadequate to enable him unaided to cope with the greatest problem of his lifetime—two complicated indictments on which he might be sentenced to as much as 40 years' imprisonment. Par. 2 of Palmer's petition for habeas corpus recited his confinement in the Polk State School as "mentally abnormal". (R. 2). The warden's answer discloses that Palmer was classified at Polk as an "imbecile". (R. 5). An imbecile is intermediate between idiot and moron in the range of the "feeble-minded". "Feeble-minded" is a generic term that includes all mental defects "arising from arrested or imperfect mental development, as the result of which the person so affected is incapable of competing on equal terms with his normal fel-

lows or managing himself or his affairs with ordinary prudence." The imbecile's development "does not exceed that of a normal child of about seven years." He can be "materially improved by training, but not sufficiently to take a place in the world." See Louttit, Clinical Psychology (1936) 98; 12 Encyclopaedia Britannica (14th Ed.) 387. "Morons", the highest classification of the feeble-minded, "can usually learn to read and write but few attain more than the fourth grade. With a little supervision they can perform simple, routine work such as operating automatic machines. Those of the lower grades can wash dishes, run errands, etc. They are not capable of consistent and sagacious planning and do not exercise ordinary prudence in looking after their affairs." Noyes, Modern Clinical Psychiatry (1948) 430.

Although Palmer was eventually released from Polk (the record does not disclose the circumstances) the continuance of his mental disability to the time of the robbery trial is adequately averred in Par. 2 of his petition, in which he characterized himself as an "irresponsible" boy at the time of his arrest in December 1930. It is well-settled that prisoners' petitions are not to be "meticulously" scrutinized for pleading imperfections. *Gibbs* v. *Burke*, 337 U.S. 773, 779; *Tomkins* v. *Missouri*, 323 U.S. 485, 487. Palmer's pleading on this point is adequately illuminated by the reference in his brief below to the records of the Psychology Department of the Western State Penitentiary, showing that upon his admission to that institution in 1931, he had a mental age of 11 and was classified as feeble-minded, with an I.Q. of 74 (R. 25). Considering the crucial bearing of this information on the legality of Palmer's imprisonment, and the fiduciary obligation of public officials to the courts and to those in their custody who are incapable of self-protection, it might have been fairer for the warden or the district attorney to inform the habeas corpus court just

what Palmer's mental condition was in 1931, as revealed by the penitentiary records. It may be assumed that if those records had shown that Palmer was of normal intelligence upon admission, the answers would not have failed to emphasize that fact. Instead, the answers are silent on that subject, ignoring petitioner's allegation that he was at the time of his trial an irresponsible boy who had been committed to Polk State School "because he was mentally abnormal". (R. 2).

The Pennsylvania Superior Court attempted to meet the issue of Palmer's mental defect by referring to the "comprehensive and legalistic brief" bearing petitioner's signature, as proof of his intellectual capacity. However, it is common knowledge that such papers are drawn by specially articulate and sometimes legally trained convicts, who come to be known as "prison lawyers". See Mr. Justice Frankfurter's opinion in *Williams* v. *Kaiser*, 323 U.S. 471, 484; *Rice* v. *Olson*, 324 U.S. 786, 787. Even if the brief were attributed to Palmer, it would bear only on his mental capacity in 1950, almost 20 years after the trial at which he says he was incapable of making an adequate defense. Pennsylvania's post-conviction review procedure would be vulnerable under the 14th Amendment if Palmer's 1931 mental capacity, the central factual issue in this case, can be adjudged on the basis of an appellate brief filed on his behalf 19 years later, after his habeas corpus petition had been dismissed without hearing. While a state is free to select its own procedures for post-conviction review, it must as a matter of due process afford some opportunity to establish basic constitutional or jurisdictional defects in the sentencing process. This means a hearing on controverted issues of material fact. *Smith* v. *O'Grady*, 312 U.S. 329; *Hawk* v. *Olson*, 326 U.S. 271; cf. *Walker* v. *Johnson*, 312 U.S. 275.

Both the Common Pleas and the Superior Court relied upon Palmer's previous court experiences as evidence of

the likelihood that he understood the charges against him and the significance and consequences of a plea of guilty. Unquestionably, previous experience in criminal proceedings is a factor to be weighed in this connection, where there is nothing to suggest that the experience was irrelevant and that the capacity of the person involved to learn from experience was unimpaired. That was not the case here. Not only was Palmer's mind stunted; but the very series of thieving episodes which led to his continual return to custody, culminating in the admitted Leader's Dry Goods offense committed on the very day of his release from Morganza, indicates a mind very nearly incapable of learning from experience.

Even a sound mind could not have learned from Palmer's previous experiences much that would have stood him in good stead on February 18, 1931. He had had only a single encounter with an ordinary criminal court, and that three and one-half years before, at the age of 17½ (R. 6). Before that, owing to his extreme youth, all his contacts with the law must have been in the juvenile court, a tribunal distinguished from the ordinary criminal court in many vital respects. The juvenile court deals with dependent, neglected and delinquent children as part of a single responsibility to protect and rehabilitate. In those tribunals there are no jury trials, and lawyers rarely appear. There is no "conviction" or "guilt" even if the child is found to have been engaged in delinquent conduct which, in an adult, would be criminal. See Pennsylvania Juvenile Court Act of 1903 as amended, 11 Purd. Pa. Stat. Ann. (1930) Secs. 71 et seq., and special provisions as to the "sole jurisdiction" of the Allegheny County juvenile court in 17 Purd. Pa. Stat. Ann. (1930) Sec. 653; *Commonwealth* v. *Fisher*, 213 Pa. 48, 62 Atl. 198 (1905); Sutherland, Principles of Criminology (1947 ed.) chapter 17.

It may be noted further that Palmer's single previous ex-

perience in the ordinary criminal court was on a charge of "breaking and entering". Breaking and entering was the charge to which Palmer thought he was pleading guilty in 1931, having been so informed by the arresting officers, according to the uncontradicted allegations of the petition for habeas corpus. Never before, so far as the record goes, had Palmer been charged with an offense like robbery, involving personal violence and arms. The record is silent as to whether the 17 year-old Palmer was represented by counsel in the 1927 proceeding for breaking and entering, or whether, as in the present case, he pleaded guilty without counsel or trial, all in a matter of minutes. By Act of June 15, 1939, Pennsylvania raised the juvenile age limit from 16 to 18, indicating the present legislative judgment that the ordinary criminal court is no place for a boy of 17. 11 Purd. Pa. Stat. Ann. (1949 Supp.) Secs. 243(2) and 269-202(f).

It is submitted that the petitioner's previous experience in criminal matters was meager and largely irrelevant to the problems he faced on February 18, 1931. Such experience would not have availed a person of normal intelligence, much less a feeble-minded young man most of whose life had been spent in institutions. Even mature individuals of normal intelligence have not in all circumstances shown themselves or been regarded as qualified to conduct their own defense merely because of previous encounters with the law. See *Townsend* v. *Burke*, 334 U.S. 736; *Gibbs* v. *Burke* ("in his thirties"; 8 previous convictions, 9 acquittals, discharges and no bills). Wade, an 18 year-old apparently normal boy who was convicted of breaking and entering, was held by this Court to be incapable of adequately representing himself "even in a trial which apparently involved no complicated legal questions", although he had had previous court experiences. *Wade* v. *Mayo*, 334 U.S. 672, 683.

III

THE ROBBERY CHARGES WHICH PALMER FACED WERE SO SERIOUS AND COMPLEX AS TO MAKE ASSISTANCE OF COUNSEL A CONSTITUTIONAL REQUISITE.

It is defendant's critical "need" for assistance of counsel that is the ultimate criterion of his constitutional right to have it. This theme recurs again and again in the opinions and formulations of the constitutional rule. *Williams* v. *Kaiser*, 323 U.S. 471, 483; *Rice* v. *Olson*, 324 U.S. 786, 789; *Hawk* v. *Olson*, 326 U.S. 271, 278; *Von Moltke* v. *Gillies*, 332 U.S. 708, 721; *Uveges* v. *Pennsylvania*, 335 U.S. 437, 441-2; *Gibbs* v. *Burke*, 337 U.S. 773, 781. Need is obvious when the defendant is young, ignorant and handicapped. Even the simplest legal case is more than immature and feeble minds can cope with. But when a case involves extreme penalties and complex issues of law foreign to the lay understanding, the need becomes imperative not merely for the handicapped but for any defendant. The relative gravity and complexity of the charge is adverted to in the following cases among others as a guiding consideration in determining when the Constitution requires assistance of counsel: *Williams* v. *Kaiser*, *Hawk* v. *Olson*, *Bute* v. *Illinois*, *Wade* v. *Mayo*, *Von Moltke* v. *Gillies*, and *Uveges* v. *Pennsylvania*, all previously cited.

Under the law of Pennsylvania at the time of Palmer's trial and plea, aggravated robbery was punishable by fine up to $5,000 and imprisonment "by separate or solitary confinement at labor, for any term of not more than twenty years". See Appendix. This penalty exceeded that prescribed for second degree murder, inasmuch as the latter, although likewise carrying a 20-year maximum, did not require penal servitude "at labor", nor was any fine imposed. Sec. 76 of the Act of March 31, 1860, P.L. 385 as amended, 18 Purd. Pa. Stat. Ann. (1930) Sec. 2223. The

twenty-year maximum for aggravated robbery may be compared with the 5-year penalty provided for simple robbery, the 15-year maximum for rape, and the ten-year maximum for burglary. 18 Purd. Pa. Stat. Ann. (1930) Secs. 2891, 2261, 3041. The sentence actually imposed upon Palmer, 30-year maximum, and the 20 years already served, may be compared with the average time served in Pennsylvania penitentiaries for *first degree murder*, which is 15 years according to an unpublished study prepared at the University of Pennsylvania Law School in 1951 for the Royal Commission on Capital Punishment. The study was based on statistics for the past 50 years supplied by the state penitentiaries. It is evident that, next to life itself, the gravest issues were at stake in Palmer's trial of February 18, 1931.

And the outcome turned on extremely complicated legal questions. The importance of the distinction between simple and aggravated robbery, in terms of a choice between a maximum imprisonment of 5 or 20 years, has already been adverted to. It will be seen from the statute reproduced in the Appendix that robbery may be aggravated either by the circumstance that the robber was "armed with an offensive weapon or instrument" or that he acted "together with one or more person or persons". The indictments in this case charged both. (R. 19-22). As to being armed, the indictments charged that revolvers were used, but do not say that the revolvers were loaded. It is generally known that hold-up bands and individual robbers often seek to forestall the possibility of a death sentence for a killing "accidentally" occurring in the commission of robbery, by using and insisting that comrades use unloaded guns. It is an open question in Pennsylvania whether an unloaded revolver is an "offensive weapon". At least one state has reached a negative conclusion on this point. *Luitze* v. *State*, 204 Wis. 78, 234 N. W. 382; see Annotation,

74 A.L.R. 1206; cf. *Price* v. *United States*, 156 Fed. 950 (9th Cir. 1907); *People* v. *Sylva*, 143 Calif. 62, 76 Pac. 814. Some of these authorities indicate that the issue might turn on whether the weapon was merely being pointed at the victim or whether the circumstances were such that the robber was in a position to use the gun as a club.

As for the aggravating circumstance of acting "together with" other persons, this invokes the law of conspiracy and vicarious responsibility, with which this Court has wrestled on more than one occasion. See *Von Moltke* v. *Gillies*, 332 U.S. 708, 721-728. Since a conviction could be rested either on the use of "offensive weapons" or the participation of accomplices, Palmer, if he was involved in these robberies at all, which is denied, must have had to appraise the state's case not only against himself, but against Conti and Mason, for conspiracy requires the guilty participation of at least two. *Gebardi* v. *United States*, 287 U.S. 112; *Delaney* v. *State*, 164 Tenn. 432, 51 S. W. 2d 485 (1932). The importance of this in the present case can be gauged from the fact that Conti was acquitted after a trial, while the indictment against Mason was dismissed for want of evidence on motion of the district attorney. (R. 21, 23). Of course, in view of Palmer's persistent contention that he had nothing to do with the robberies (R. 24), had never heard of the charges before he reached the penitentiary (Par. 5 of the petition, R. 3, not specifically contradicted by the answers), and thought he was pleading guilty to breaking and entering Leader's Store (Pars. 3 and 4 of the petition, R. 3, not specifically contradicted by the answers), it is almost academic to talk of his appraising anybody's case—there was no occasion for him to address even his limited faculties to the problems which the indictments raised.

A third complication in the case involves the law of attempt. The district attorney, the warden and the Court

of Common Pleas in its opinion on habeas corpus refer to Indictment No. 24 (Rosella robbery) as "attempted robbery". (R. 5, 7, 10-11). The general difficulties of the law of attempt are hardly less than those of conspiracy: Was the means employed by the actor "reasonably adapted" to the end? Did the overt act come "dangerously close" to accomplishment or was the actor still engaged in "preparation"? Did the act "unequivocally manifest" the criminal intent? Was failure attributable to "legal impossibility" or only "factual impossibility". Is successful completion of the crime a bar to conviction for the attempt? These and other obscurities and contradictions have made the subject a favorite of commentators. See generally materials collected in Michael & Wechsler, Criminal Law and Its Administration (1940) chapter V. But in Pennsylvania and in this case these difficulties are compounded. Pennsylvania has no general statutory provision for the punishment of attempt. By virtue of the common law—still in effect in this state notwithstanding the enactment of so-called Penal Codes [1]—attempts are punishable, but how severely is in some doubt. By a process of judicial legislation, the courts in two cases have indicated that attempts cannot be punished *more* severely than the accomplished crime; and it has been observed that "There are indications in our Penal Code of 1860 of a legislative intent to punish attempts with less severity than is prescribed for the completed offense." *Commonwealth ex rel. Swisher* v. *Ashe*, 145 Pa. Super, 454, 458, 21 A. 2d 479 (1941); *Cavalucci* v. *Smith*, 154 Pa. Super. 613, 36 A. 2d 732 (1944). Perhaps the greatest source of confusion in connection with the attempt question is the fact that the robbery statutes them-

[1] See Sec. 178 of the Act of March 31, 1860, P.L. 382. 425, 18 Purd. Pa. Stat. Ann. (1930) Sec. 3741; cf. Sec. 1101 of the Penal Code of 1939, 18 Purd. Pa. Stat. Ann. (1945) Sec. 5101; *Commonwealth* v. *Gettis*, 166 Pa. Super. 515, 72 A. 2d 619 (1950).

selves cover "assault with intent to rob", and punish it just like any other robbery. Whether this is or is not identical with the common law "attempted robbery" cannot be known with any certainty.

But while it would challenge the ingenuity of a Philadelphia lawyer to pick his way through these subtleties, one thing can be said with reasonable assurance. Even if somebody in the court on February 18, 1931, recited that the charges were "robbery and attempted robbery", the distinction could hardly have meant anything to this weak-minded youth except that attempted robbery was probably a lesser offense carrying a milder penalty. On the contrary, for reasons not disclosed, Palmer was given the same sentence on No. 24, the "attempt", and ordered to serve that sentence before the sentence imposed for the allegedly successful robbery of Brinn, No. 23.

From Palmer's point of view at his trial—and from no other is it fair to judge the need for legal assistance—even such distinctions as that between robbery on the one hand and larceny, breaking and entering, or burglary were probably indistinct or non-existent. He had admitted breaking and entering Leader's Dry Goods Store, and had been told by the police that this was the charge against him. It is doubtful that any warning would have sounded in his dim comprehension even if he had heard someone in court ask him if he wished to plead guilty to "robbery", when he was prepared to plead guilty to a breaking and entry. The laity knows all acquisitive crimes as "robbery". Even educated persons will speak of a neighbor's house as having been "robbed" when no one was present, although a lawyer would realize that only burglary could have been committed.

The last difficulty of substantive law which should be called to the Court's attention is the defense of insanity. Considering Palmer's known mental defect and the repeti-

tive and apparently compulsive character of his thefts, alert counsel might well have interposed a plea of not guilty by reason of insanity, especially since Pennsylvania law recognizes "irresistible impulse" as an insanity defense. *Commonwealth* v. *Mosler*, 4 Pa. 264 (1846) and *Commonwealth* v. *Calhoun*, 238 Pa. 474, 86 Atl. 472 (1913); but see *Commonwealth* v. *Schroeder*, 302 Pa. 1, 152 Atl. 835 (1930).

Finally, it is clear that assistance of counsel was essential to basic fairness in determining the sentence to be imposed on the defendant. Defense counsel would have elicited from Palmer, from his record, and from the witnesses all the circumstances of mitigation, of relative responsibility for the alleged joint misdeed, of the need for medical rather than punitive treatment, etc. This Court put the matter as follows in *Carter* v. *Illinois*, 329 U. S. 173, 178:

> ". . . A trial court may justifiably be convinced that a defendant knows what he is about when he pleads guilty and that he rightly believes that a trial is futile because a defense is wanting. But the imposition of a sentence presents quite different considerations. There a judge usually moves within a large area of discretion and doubts. Such is the situation under Illinois law. The range of punishment which a judge in Illinois may impose for murder is between fourteen years and death. It is a commonplace that no more difficult task confronts judges than the determination of punishment not fixed by statute. Even the most self-assured judge may well want to bring to his aid every consideration that counsel for the accused can appropriately urge. . . ."

See also *Von Moltke* v. *Gillies*, 332 U.S. 708, 721; *Townsend* v. *Burke*, 334 U.S. 736 (prejudicial error in sentencing); *Canizio* v. *New York*, 327 U.S. 82 (presence of counsel at sentencing saved validity of proceedings); *Bute* v. *Illinois*, 333 U.S. 640, 670 (referring to the fact that the sentence

imposed was mandatory; i.e. no question of discretion here where assistance of counsel might have helped).

IV

THE CIRCUMSTANCES OF PALMER'S TRIAL DEMONSTRATE ACTUAL PREJUDICE DUE TO LACK OF COUNSEL.

1. Palmer's petition for habeas corpus averred, and the answers did not deny, that the arresting officers told him he was being charged with breaking and entering, and that he thought he was pleading guilty to such a charge. A representation by the arresting officers obviously would have contributed to the likelihood of his misunderstanding the charges against him and the consequences of a guilty plea. Thus, aside from all question of defendant's youth and mental handicap, we have here the problem of the uncounseled accused being misled by prosecution officials. It was such a misunderstanding attributable to enforcement officers that moved this Court in *Smith* v. *O'Grady*, 312 U.S. 329, 332-3 and *Von Moltke* v. *Gillies*, 332 U.S. 708. The Court has been especially sensitive to accused's misunderstanding the nature of the charge against him, for "real notice of the true nature of the charge against him [is] the first and most universally recognized requirement of due process". *Smith* v. *O'Grady*, *supra* at 334; cf. *Carter* v. *Illinois*, 329 U.S. 173, 174 ("Inherent in the notion of fairness is ample opportunity to meet an accusation"); *Cole* v. *Arkansas*, 333 U.S. 196, 201. In *Bute* v. *Illinois*, 333 U.S. 640, 670 the Court pointed out that there was no claim of failure to understand the charges. The legality of the detention in *Quicksall* v. *Michigan*, 339 U.S. 660 was affirmed only after a trial on the issue of defendant's understanding of the charges and the consequences of his plea, even though the original trial record recited the lengths to which the sentencing judge had gone to inform the defendant fully as to the charge.

Counsel would have prevented Palmer's misunderstanding the charges against him.

2. Lack of counsel likewise prejudiced the defendant because of the failure to raise the question of his illegal detention for three days between arrest and preliminary hearing. (R. 8-9) No contention can be made on the present record that the circumstances of this detention alone deprived the sentencing court of jurisdiction; but illegally prolonged detention is surely suggestive enough of the inquisitorial purpose of the police to support an inference that alert counsel would have looked into the matter to see if by chance the plea of guilty were not the result of the suction process of interrogation, a process not unknown in Pennsylvania. See *Turner* v. *Pennsylvania*, 338 U.S. 62; *Agoston* v. *Pennsylvania*, 340 U.S. 844; *Johnson* v. *Pennsylvania*, 340 U.S. 881; cf. *Commonwealth ex rel. Sheeler* v. *Burke*, 367 Pa. 152, 79 A. 2d 654 (1951). It is significant that Palmer was not charged with robbery until two days after his arrest.

3. Mere inspection of the indictments discloses the unfairness of putting this defendant to trial without counsel. These documents (R. 20-23) would be well-nigh unintelligible to most people. They appear to have been copied from forms containing two counts, the first for aggravated robbery, the second for receiving stolen goods. Opening with the archaic language of 18th century pleading, Count 1 of Indictment No. 23 proceeds to charge that Palmer, Conti and Mason

> ". . . being then and there armed with offensive weapons, to-wit; revolcers, with force and arms, in and upon one David Brinn feloniously did make and assault, and did then and there feloniously beat, strike and ill use the said David Brinn and do violence to said David Brinn with intent then and there to feloniously rob the said David Brinn *and* the sum of twenty dollars, lawful money of the Government of the United States, of the goods, moneys, chattels and property of the said David Brinn, from the person of the said David Brinn, feloniously did rob, seize, steal, take and

carry away, contrary to the form of the Act of the General Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania. . . ." (Italics added) (R. 20)

While the general purport of this is decipherable, the precise structure and meaning are so hard to follow that the district attorney himself seems to have thought it necessary to substitute the word "of" for the word "and" which is underlined in the above quotation. (See R. 7.) On the other hand Count 1 of Indictment No. 24 uses both words. (R. 22). It requires at least two close readings through the inversions and parentheses of Count 2 of each indictment to reveal that it deals with receiving the same stolen property which the defendants are accused of stealing in Count 1. There is the added confusion in Indictment No. 23 (the Rosella "attempted robbery") that the pleader repeats all the allegations of stealing and receiving, indicating the distinction from a completed robbery only by failing to state what was stolen or received. Cf. the references to the "simple terms" and "intelligibility" of the indictments in *Bute* v. *Illinois*, 333 U.S. 640, 645, 670.

4. The esoteric language of the indictments lend added significance to another circumstance of prejudice to Palmer. Pennsylvania is one of the very few states without statutory provision for furnishing copies of indictments to the accused at any stage of the proceedings. See notes to Sec. 85 of the Code of Criminal Procedure of the American Law Institute (1931) 603-607. This Court has often indicated the importance of the timely availability of copies of the charge, noting that such copies were denied in *Smith* v. *O'Grady*, 312 U.S. 329, 333, furnished belatedly in *House* v. *Mayo*, 324 U.S. 42, 45, furnished in *Bute* v. *Illinois*, 333 U.S. 640, 643, footnote 3; cf. *Hawk* v. *Olson*, 326

U.S. 271, 279 (no showing that "the charge was served upon petitioner well in advance of the trial"). In the counties with which petitioner's counsel is familiar it is not the practice even to read the indictments to the accused at arraignment, except in murder cases. It is significant that the district attorney's answer made no claim that the indictments were read or explained to Palmer. It is evident that Palmer had no opportunity to learn from inspection or study of the indictments what the charges against him were. A lawyer would, of course, have informed himself and his client of the precise accusation.

Moreover, Pennsylvania makes no statutory provision such as is found in other states imposing a duty on the trial judge to advise as to the nature of the charges and the consequences of a guilty plea. This Court has often pointed to the existence of such protective legislation as some assurance that the uncounseled defendant received decent guidance from the bench. *Bute* v. *Illinois*, 333 U.S. 640, 670-671; *Foster* v. *Illinois*, 332 U.S. 134, 138. *Gibbs* v. *Burke*, 337 U.S. 773, 781 refers to the failure of one Pennsylvania judge to give "adequate judicial guidance or protection" to a defendant representing himself. *Quicksall* v. *Michigan*, 339 U.S. 660 and *Carter* v. *Illinois*, 329 U.S. 173, illustrate the saving grace of judicial protection of the accused. *De Meerleer* v. *Michigan*, 329 U.S. 663, and *Von Moltke* v. *Gillies*, 332 U.S. 708 show the fatal defect of letting an uncounseled defendant blunder into an unconsidered guilty plea.

5. Far from affording Palmer the judicial protection which might have made up for lack of counsel, the trial judge failed to accord Palmer one of the few protections which the Pennsylvania legislature did charge its courts to provide in such situations. Section 308 of the Mental Health Act of

1923, 50 Purd. Pa. Stat. Ann. (1931) Sec. 48, provides in part as follows:

> "When, on the production or appearance of any person charged with criminal offense, or on the production or appearance before the court of such a person under any other circumstances, it shall appear to the court that such person is insane, or in such condition as to make it necessary that he be observed or cared for in a hospital for mental diseases, proceedings for the commitment of such person to such a hospital shall be had . . ."

Disposition of Palmer under this statute, if not plainly the duty of the court on its own motion, in view of Palmer's background, would at least have been urged on the court by counsel, if one had been provided. As previously indicated, also, counsel might have pleaded Palmer not guilty by reason of insanity.

Instead, in a hearing lasting only "a minute, more or less" (Par. 3 of the petition, R. 3, not denied) Palmer was sentenced to a maximum of 30 years imprisonment. The very haste of this proceeding impugns its fairness. See *Powell* v. *Alabama*, 287 U.S. 45; *Smith* v. *O'Grady*, 312 U.S. 329, 334; *Carter* v. *Illinois*, 329 U.S. 173 (no "precipitancy in the acceptance of a plea of guilty"); *De Meerleer* v. *Michigan*, 329 U.S. 663, 665 ("hurried through unfamiliar legal proceedings"). A little more deliberation at least would have characterized Palmer's trial, if he had had a lawyer.

6. The final indication of actual prejudice to Palmer from want of counsel is the discharge of his alleged accomplices. It has already been pointed out that Conti was acquitted by a jury, and the indictment against Mason was nol-prossed for want of evidence. (R. 21, 23). A certain inference arises as to the weakness of the case against Palmer. In any event it has already been shown that Palmer's guilt of aggravated robbery (assuming he was involved at all)

may well have turned on the participation of accomplices —and they were absolved.

Conclusion

It follows from the foregoing that, for want of benefit of counsel, Palmer's trial lacked the fundamental requisites of due process. One may say not merely that "an ingredient of unfairness operated in the process" (*Foster* v. *Illinois*, 332 U.S. 134, 137) but, in the words of *Betts* v. *Brady*, 316 U.S. 455, 473 that it is "offensive to the common and fundamental ideas of fairness and right" that an uncounseled, feeble-minded 21 year-old should have been hurried off to 30 years imprisonment without a word of guidance from the bench or the kind of searching inquiry which alone justifies a court in accepting a waiver of counsel and plea of guilty to a grave charge. *Kercheval* v. *United States*, 274 U.S. 220, 223; *Von Moltke* v. *Gillies*, 332 U.S. 708, 724. Mr. Justice Burton, speaking for the dissenters in the *Von Moltke* case, differed from the majority only because the dissenting justices read the record as establishing that the guilty plea was "long considered and unequivocal", and the waiver of counsel "freely, intelligently and knowingly made". 332 U. S. at 731. No such case is here.

"The importance of the assistance of counsel in a serious criminal charge after arraignment is too large to permit speculation on its effect." *Hawk* v. *Olson*, 326 U.S. 271, 278. But speculation is unnecessary in this case. It is clear from the record that by the standards which this Court has formulated and by any others that would command the respect of a free world, the petitioner, Dominic Palmer, should be discharged from custody.

Respectfully submitted,

LOUIS B. SCHWARTZ,
Counsel for Petitioner.

OCTOBER 11th, 1951.

APPENDIX

Robbery Statutes in Force in Pennsylvania in 1931

18 Purd. Pa. Stat. Ann., Secs. 2891 and 2892

§ 2891. *Robbery and assault and battery with intent to rob*

If any person shall rob another, or shall steal any property from the person of another, or shall assault any person with intent to rob him, or shall, by menaces or by force, demand any property of another, with intent to steal the same, such person shall be guilty of felony, and being convicted thereof, shall be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment, by separate or solitary confinement, not exceeding five years. (1860, March 31, P. L. 382, § 102.)

§ 2892. *Robbery with aggravating circumstances*

If any person, being armed with an offensive weapon or instrument, shall rob, or assault with intent to rob, another; or shall, together with one or more person or persons, rob, or assault with intent to rob; or shall rob any person, and at the same time, or immediately before or immediately after such robbery, beat, strike, or ill-use any person, or do violence to such person, the person so offending shall be guilty of felony, and being thereof convicted, shall be sentenced to pay a fine, not exceeding five thousand dollars, and undergo an imprisonment, by separate or solitary confinement at labor, for any term of not more than twenty years: Provided, That the provisions of this act shall not apply to any crimes committed before the passage hereof, but all such crimes shall be prosecuted as heretofore under the provisions of the section to which this is an amendment. (1860, March 31, P. L. 382, § 100; 1919, April 18, P. L. 61, § 1.)

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Supreme Court of the United States

OCTOBER TERM, 1951

NO. 38

DOMINIC PALMER, Petitioner,

v.

STANLEY P. ASHE, Warden, Western State Penitentiary, Pittsburgh, Pennsylvania, Respondent.

On Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania.

BRIEF FOR RESPONDENT

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STANLEY P. ASHE, Warden, Western State Penitentiary, Pittsburgh, Pennsylvania, Respondent.

On Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania.

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

1. Where a state court accepts a plea of guilty from a defendant over 21 years of age appearing without counsel, does such lack of counsel constitute denial of due process of law?

2. Must a state court grant a hearing before dismissing a petition for *habeas corpus* alleging denial of due process, where the presence of due process is evident from the face of the record?

3. Is a court justified in dismissing a petition for *habeas corpus* which asserts denial of due process, where the petition contains unsupported allegations concerning circumstances at or prior to sentence, where the petitioner has delayed filing his petition until more than 18 years after the sentence without averring any cause for such delay, and where, by reason of such delay, it is difficult if not impossible to controvert many of the allegations of the petition?

RESPONDENT'S STATEMENT OF THE CASE

A writ of certiorari was granted by this court on April 30, 1951, to review an order (R. 30) of the Supreme Court of Pennsylvania refusing to allow an appeal from an order (R. 17) of the Superior Court of Pennsylvania affirming an order (R. 12) of the Common Pleas Court of Allegheny County, Pennsylvania, dismissing the petition of Dominic Palmer for a writ of *habeas corpus*.

Petitioner, Dominic Palmer, is now serving a sentence of not less than 5 nor more than 15 years imposed on February 18, 1931, by the Court of Oyer and Terminer of Allegheny County, Pennsylvania, upon his plea of guilty to an indictment at No. 23 January Sessions, 1931, charging robbery (R. 6). This sentence was made to begin at the expiration of another sentence of not less than 5 nor more than 15 years imposed by the same court on the same day at No. 24 January Sessions, 1931, on petitioner's plea of guilty to an indictment charging attempted robbery (R. 6), and did begin on August 26, 1942, when parole was granted on the sentence first imposed (R. 5).

Complaint, Arrest and Preliminary Hearing.

Petitioner was arrected December 20, 1930, and was given a hearing on December 23, 1930 (R. 9) before a committing magistrate upon a complaint, duly sworn to, charging the offenses for which he was subsequently indicted and sentenced. The records of the Clerk of Courts of Allegheny County, Pennsylvania, at No. 24 and 23 January Sessions, 1931, show that the petitioner was present at the hearing and that witnesses for the Commonwealth, including the victims of the offenses charged, were produced, sworn, and examined (R. 8, 9).

Indictment, Trial, Plea, and Sentence.

On January 9, 1931, the grand jury, after hearing witnesses, returned true bills on the indictments charging the offenses (R. 21, 22). On January 16, 1931, petitioner appeared in open court and entered pleas of guilty to the indictments (R. 6). Petitioner again appeared in open court on February 18, 1931, at which time the two consecutive sentences were imposed.

The record of the plea and sentence is silent as to the name of any attorney appearing for petitioner, as to any request for counsel by petitioner, and as to any offer of counsel to petitioner.

Petitioner was granted a parole on the sentence he is now serving and was released on September 19, 1947 (R. 5). On April 1, 1949, he was recommited for violation of parole (R. 5). The sentence he is now serving will not expire until August 26, 1957 (R. 5).

The Habeas Corpus Proceedings.

The petition for a writ of *habeas corpus* was filed in the Common Pleas Court on October 11, 1949 (R. 1). Petitioner does not complain therein that he was mentally deficient at the time of his plea and sentence, but avers only that he was then a "young irresponsible boy,"[1] and that he had a background of "having spent several years in Polk[2] (because he was mentally abnormal), as well as several years in Morganza, * * *"

An answer was filed by the district attorney denying many of the allegations of the petition on the basis of records in the office of the Clerk of Courts. Other allegations could not be denied because no transcript of the proceedings had been filed, the sentencing judge (Judge George V. Moore) was deceased, and the other officials who had been present in court at the time of sentence, more than 18 years before, were deceased, or

---

1. Petitioner was then past 21.

2. Petitioner was discharged from Polk State School on September 10, 1920 (R. 5), more than 10 years before the imposition of the sentences complained of. However, on October 31, 1921, a year after his discharge from Polk, he was committed to Thorn Hill School for larceny. He was released on parole on April 14, 1924, returned for larceny and delinquency on June 30, 1924, and discharged on June 1, 1926 (R. 6). A year later, on July 21, 1927, he was committed to the Pennsylvania Training School at Morganza for breaking and entering, paroled after 2½ years, returned for parole violation on August 4, 1930, discharged on December 18, 1930, and, on the same day he was discharged, committed the two offenses for which he received the sentences he now complains of (R. 6, 7). Neither Thorn Hill School nor Pennsylvania Training School is an institution for mental defectives; both are correctional institutions for younger criminal offenders.

could not be located, or had no recollection of what had transpired.

Upon consideration of the petition and answers and on the basis of the original record (R. 11) submitted by the clerk, Judge Rowand of the Court of Common Pleas filed an opinion (R. 10, 11) and entered an order (R. 12, 13) dismissing the petition and denying the writ.

Petitioner appealed from the order of Common Pleas Court to the Superior Court of Pennsylvania. The Superior Court affirmed the order in a *per curiam* opinion (R. 14-16). The Supreme Court of Pennsylvania denied, without an opinion, a petition for an allowance of an appeal from the order of the Superior Court (R. 30).

Petitioner's application to the Supreme Court of the United States for a writ of certiorari was granted on April 30, 1951 (R. 31).

SUMMARY OF ARGUMENT

The due process clause of the Fourteenth Amendment does not require a state court in a criminal proceeding to offer a defendant counsel or to advise him of his right to counsel, where the defendant is charged with a non-capital offense. It is only where special circumstances tending to result in injustice or fundamental unfairness are present that a failure to provide a defendant with counsel may deny him due process of law. No such special circumstances were present in this case.

Petitioner, a man 21 years of age, with a record of prior offenses, was not denied due process of law when the state court allowed him to enter a plea of guilty without counsel. The mere fact that he had at one time, at the age of 10, been in a mental institution did not render his plea of guilty void because he did not have counsel.

The dismissal without hearing of the petition for writ of *habeas corpus* was proper, because the petition did not allege that mental deficiency existed at the time of sentence or that prior mental deficiency resulted in any injustice, and failed to make out a *prima facie* case of the denial of due process of law.

Petitioner failed in the court below to meet the burden of establishing a denial of due process, and may not now attempt to establish such a denial by allegations which were not before the court below.

ARGUMENT

I. The acceptance by the court of petitioner's plea of guilty without providing him with counsel, in the absence of special circumstances tending to result in injustice or fundamental unfairness, did not deny him due process of law.

The appellate courts of Pennsylvania have repeatedly held that, where a non-capital offense is charged, the due process clause of the Fourteenth Amendment to the United States Constitution does not require a Pennsylvania court to provide an accused with counsel, where none is asked for, nor does it prohibit a court from accepting a plea of guilty from an uncounseled defendant. *Commonwealth ex rel. McGlinn v. Smith,* 344 Pa. 41, 24 A. 2d 1 (1942); *Commonwealth ex rel. Townsend v. Burke,* 361 Pa. 35, 63 A. 2d 77 (1949); *Commonwealth ex rel. Hovis v. Ashe,* 165 Pa. Super. 30, 67 A. 2d 770, (1949), affirmed 364 Pa. 81, 70 A. 2d 630, cert. den. 339 U.S. 970, 79 S. Ct. 990.

This court has likewise ruled that, where a non-capital offense is charged, a state court is not required by the due process clause of the Fourteenth Amendment to inquire as to the defendant's desire to be represented by counsel or to assign counsel to him. *Bute v. Illinois,* 333 U.S. 640, 68 S. Ct. 763 (1948); *Betts v. Brady,* 316 U. S. 455, 62 S. Ct. 1252 (1941).

It is only where there are, in addition to the gravity of the offenses charged, other factors present which tend to result in injustice or in fundamental unfairness that the accused must have legal assistance under the

Fourteenth Amendment. *Uveges v. Pennsylvania,* 335 U.S. 437, 69 S. Ct. 184 (1948), (the extreme youth of the accused); *Gibbs v. Burke,* 337 U. S. 773, 93 L. Ed. 773 (1949) (accused was his own counsel and incompetent and prejudicial evidence was admitted); *Townsend v. Burke,* 334 U.S. 736, 68 S. Ct. 1252 (1945) (improper conduct of the trial judge).

There was in this case, at or prior to the sentencing of petitioner without counsel, no circumstance which tended to result in any injustice or fundamental unfairness to him.

Petitioner at the time of the entry of his pleas was 21 years old. In this respect alone, his case is readily and clearly distinguishable from *Uveges v. Pennsylvania,* 335 U.S. 437, upon which he so strongly relies. Uveges at the time of his plea was 17 years old. This difference of four years at this period of life is the difference between a minor and an adult. The legislature of Pennsylvania has declared 18 to be the age at which the jurisdiction of the juvenile court terminates and the jurisdiction of the criminal court begins.[3] According to statistics issued by the Federal Bureau of Investigation,[4] 21.4% or more than one-fifth of *all* offenders arrested for robbery are in the 18-20 age group between Uveges and petitioner. The law recognizes that persons

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3. Act of June 15, 1939, P. L. 394, Sec. 1, 11 Purdon's Pa. Stat. sec. 243-2.

4. Uniform Crime Reports issued by the Federal Bureau of Investigation, Annual Bulletin 1950, Volume XXI, No. 2, page 111:

Offense charged: Robbery
Percentage arrested under 18 years of age: 7.0
Percentage arrested under 21 years of age: 28.4
Percentage arrested under 25 years of age: 54.1

reaching the age of 21 have attained maturity of judgment with ability to manage their own affairs, by granting to persons of that age the right to vote and to enter into enforceable contracts and by relieving them generally of the legal disabilities of infancy. Thus petitioner's age of 21 was insufficient to obligate the court to refuse his plea of guilty without counsel.

Petitioner relies heavily in his brief upon the contention that he was mentally deficient at the time of his plea and that, for that reason, the court denied him due process when it accepted his plea without counsel. It should be noted that the petitioner does not allege in his petition for writ of *habeas corpus* (R. 2-4) that he was mentally deficient at the time of his plea and sentence. Petitioner merely states information concerning his background as follows (R. 2):

> "Second, your petitioner, a young irresponsible boy, having spent several years in Polk (because he was mentally abnormal) * * *"

This statement does not necessarily imply that the petitioner was mentally deficient at the time of his plea ten years after his discharge from Polk State School. In fact the contrary appears from the record. Not only had petitioner been finally discharged from Polk State School at the age of 10 (R. 5), but he had in the intervening period of more than 10 years been discharged two times each from Thorn Hill School and Pennsylvania Training School (R. 6), both correctional institutions for young, but otherwise normal offenders. If the officials of either of the last-named institutions had found petitioner to be mentally defective at any time during his commitment to them, it would have been

mandatory for them under Pennsylvania statute[5] to have petitioner transferred to a proper institution for mental defectives. The sentencing court was entitled to presume that the institution officials complied with the law, and that, therefore, petitioner was not mentally deficient when he was discharged from Pennsylvania Training School on December 18, 1930, the same day on which he committed the two offenses here involved and less than a month before he voluntarily pleaded guilty to them.

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5. The Mental Health Act of July 11, 1923, P. L. 998, Art. III, Sec. 311 as amended April 27, 1927, P. L. 431, Sec. 1, 50 Purdon's Pa. Stat., Sec. 51, provides as follows:

> "When any person detained in any prison, penitentiary, reformatory, or other penal or correctional institution, whether awaiting trial or undergoing sentence, except upon conviction for murder in the first degree, shall, in the opinion of the superintendent, jail physician, warden, or other chief executive officer of the institution, or other responsible person, be mentally defective; or when any person charged with a criminal offense and released on bail pending trial therefor, shall in the judgment of any responsible person, be a mental defective,—the said superintendent, jail physician, warden, other chief responsible officer of the institution, or other responsible person, shall in the case of a person detained in an institution, and said responsible person in other cases may, make application, upon a form prescribed by the department, to a law judge of the court having jurisdiction of the charge against said person believed to be mentally defective, or under whose order he is detained, for the examination, and if necessary, the commitment of said person to a proper institution for mental defectives."

The other contentions made by petitioner likewise fall upon inspection of the record. His contention that he did not understand the meaning of a plea of guilty is not contained in his petition for writ of *habeas corpus*. Yet the sentencing judge was fully justified at the time he received the plea in finding that petitioner understood the meaning of "guilty" in view of the fact that petitioner had been four times committed to correctional institutions, twice for larceny, once for breaking and entering, and once for an unspecified parole violation (R. 6). Petitioner's contention that he did not know the nature of the crimes with which he was charged (R. 3, 4) falls upon inspection of the record which shows that he was twice—once before the commiting magistrate and once before the sentencing judge—confronted by witnesses who testified against him concerning the offenses charged (R. 9, 11).

In view of the foregoing, it is apparent that the acceptance of a plea of guilty without counsel from petitioner, a man of full age, and without indication of mental deficiency, after he was confronted with witnesses as to the offenses charged, did not result in any injustice or fundamental unfairness.

Petitioner's contention that he was not offered counsel or advised of his right to have counsel (R. 3) was not denied, because no transcript of the proceedings at plea and sentence was filed; the sentencing judge was deceased, and all other officials who had been present in court at the proceedings, more than 18 years before, were deceased, could not be located, or had no recollection of what had transpired. However, even in the absence of such denial, the bare allegation of petitioner

should not be permitted to overcome the presumption that the sentencing court discharged its duties in a constitutional manner and in a manner which did not result in any unfairness or injustice to the petitioner. In *Bute v. Illinois,* 333 U.S. 640, 68 S. Ct. 763 (1948) the court said at page 672:

> "If any presumption is to be indulged it should be one of regularity rather than of irregularity. * * * in the complete absence of any showing to the contrary, such a presumption of regularity indicates that the court constitutionally discharged rather than unconstitutionally disregarded its state and federal duties to the petitioner, including those relating to his right, if any, to the assistance of counsel."

See also *People ex rel. Asaro v. Morhous, Warden,* 52 N.Y.S. 210 (1944); *People v. Bassinger,* 403 Ill. 108, 85 N.E. 2d 758 (1948).

Where there is an alleged denial of due process of law because of the failure of a defendant to be represented by counsel or to be assigned counsel, each case must be decided upon its own facts. *Betts v. Brady,* 316 U.S. 455, 62 S. Ct. 1252 (1941). Under the facts of this case, there was no failure to observe that fundamental fairness essentional to the concept of justice and there was not such a set of circumstances as would lead to the conclusion that due process was denied.

II. The Common Pleas Court properly dismissed the petition for habeas corpus upon consideration of the petition and answers and the original record, without hearing oral testimony, where the presence of due process was evident on the face of the record.

Where a petitioner alleges a denial of due process of law, the burden is on him to establish facts and circumstances which amount to a denial of due process. *Hawk v. Olson, Warden,* 326 U.S. 271, 66 S. Ct. 116 (1945); *Commonwealth ex rel. McGlinn v. Smith,* 344 Pa. 41, 24 A. 2d 1 (1942); *Commonwealth ex rel. Master v. Baldi,* 166 Pa. Super. 413, 72 A. 2d 150, (1950). Although the writ of *habeas corpus* is a writ of right, it does not issue as of course, but only upon cause shown. *Commonwealth ex rel. McGlinn v. Smith, supra; Commonwealth ex rel. DePoe v. Ashe,* 167 Pa. Super. 23, 74 A. 2d 767 (1950).

Petitioner in this case failed to establish in his petition that there was a denial of due process of law. He alleged that he was denied due process of law because he was not offered counsel or advised of his right to have counsel (R. 3), and because of other reasons which he summarized (R. 4). The matter of his right to counsel has been discussed above. The other allegations in his summary statement were examined by the court, which had before it the record of the original proceedings, and were found to be false on the face of the record (R. 11). Thus, after consideration of the petition in the light of the original record, the court was justified in finding that the petitioner had failed to meet his burden of establishing that due process was denied.

In view of the fact that petitioner filed his petition without counsel, it is conceded that he should not be and he has not been held to strict standards of pleading. Accordingly, the allegation of his second paragraph (R. 2), which gives his background and refers to himself as a "young, irresponsible boy, having spent several years in Polk (because he was mentally abnormal) * * *" was considered in conjunction with his eighth paragraph (R. 3) which deals with the matter of counsel. But, even adding thereto the cases which he cites, "Uveges v. Pennsylvania ..... U.S. .....; Townsend v. Burke ..... U.S. ....." (R. 3), petitioner did not establish a *prima facie* case of denial of due process, in view of the fact that the record clearly showed that petitioner's case was similar neither to the *Uveges* case, where the defendant was only 17 years old, nor to the *Townsend* case, where there was grossly improper conduct on the part of the sentencing judge. Further, the record (R. 5, 6) showed that petitioner had been released from Polk State School more than ten years prior to the time the sentences complained of were imposed, and had in the meantime been committed or recommitted four times to two other state institutions for juvenile, but otherwise mentally normal, offenders. Moreover, petitioner did not aver anywhere in his petition that his alleged mental deficiency at the time of his sentence prevented him from receiving justice, or that any advantage was taken of him because of such alleged mental deficiency. When the court considered these matters, and also the fact that the allegations concerning the failure to be advised of the charges, the failure to be confronted by witnesses, and the plea to "unspecified charges", were patently false on the face of the record, there was no error in its find-

ing that the alleged denial of due process of law was not established.

The dismissal of the petition without granting a hearing was proper, in view of the fact that Pennsylvania law does not require a hearing on a petition for a writ of *habeas corpus* where the petitioner has failed to show any cause or to make out a *prima facie* case for the issuance of the writ. *Commonwealth v. Curry,* 285 Pa. 289, 132 A. 370 (1926); *Commonwealth ex rel. McGlinn v. Smith,* 344 Pa. 51, 24 A, 2d 1 (1942); *Commonwealth ex rel. DePoe v. Ashe,* 167 Pa. Super. 23, 74 A. 2d 767 (1950). The petition of Palmer did not make out a *prima facie* case of denial of due process nor did it show any cause for the issuance of the writ.

III. The dismissal of the petition for habeas corpus was proper in view of the fact that the petition was not filed until 18 years after sentence, without explanation for the delay, and makes unsupported allegations which are now difficult or impossible to controvert because of the delay.

The petition for writ of *habeas corpus* was not filed until October 11, 1949 (R. 2), 18 years and 9 months after the commitment. Included in the petition are allegations which were practically impossible to deny in view of the fact that no transcript of the proceeding had been filed, the sentencing judge was deceased, and the other officials who had been present in court, more than 18 years before, were deceased, or could not be located, or had no recollection of the proceeding. Respondent thus was obviously severely handicapped and prejudiced by reason of petitioner's unexplained delay of more than 18 years.

Courts must be extremely careful in granting writs of *habeas corpus* in such cases of long unexplained delay, especially where, as here, some of the allegations are patently false.

The doctrine of laches is applicable to *habeas corpus* petitions. In *Commonwealth ex rel. Quinn v. Smith,* 144 Pa. Super. 160, 19 A. 2d 504 (1941), the petitioner delayed filing his petition until 16 years after his commitment. The court said at page 164:

> "But, in any event, we are of the opinion that his delay in making this application until such a great length of time had elapsed that the judge who presided at the trial has no recollection of what occurred there, as respects, the relator being represented by counsel, or refusing or waiving the appointment of counsel for him, and five of the six witnesses for the prosecution at the trial have died or cannot be found, and the sixth has no recollection of the trial of the case,—there being no stenographic notes or notes of testimony of the trial—convicts him of such laches as to call for a refusal of the prayer of his petition, and prevents his discharge from confinement."

See also *Ex parte Cole,* 208 P. 2d 193 (1949); *Ex parte Hunt,* 225 P. 2d 193 (1950); and *Ex parte Schneider,* 217 P. 2d 934 (1950).

In the present case the writ was properly refused in the absence of an explanation for the long delay in filing it.

CONCLUSION

Where denial of due process of law is alleged because a defendant was not advised of his right to counsel, and where defendant pleads guilty to the crime charged, each case must be decided on its own facts. *Betts v. Brady*, 316 U.S. 455, 62 S. Ct. 1252 (1941). What may amount to a denial of due process of law in one set of circumstances, may not be such in another. It does not appear in this case that petitioner, a man 21 years old at the time he entered his plea of guilty, suffered such injustice as to amount to a denial of due process of law.

The Common Pleas Court properly dismissed the petition without a hearing, particularly in view of the fact that there was no allegation of mental deficiency at the time the plea of guilty was entered, that the petition did not make out a *prima facie* case of the denial of due process of law, and that the petition was filed after a long, unexplained, and prejudicial delay.

The Supreme Court of Pennsylvania did not err in refusing to allow an appeal from the order of the Superior Court of Pennsylvania, affirming the order of the Court of Common Pleas of Allegheny County, dismissing the petition for writ of *habeas corpus*.

Respectfully submitted,

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